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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF MONTANA

FROM NOVEMBER 10, 1916, TO MAY 31, 1917

° **OFFICIAL REPORT**


VOLUME 53

SAN FRANCISCO
BANCROFT-WHITNEY COMPANY
1917

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JUSTICES
OF
THE SUPREME COURT OF THE STATE OF MONTANA,
DURING THE TIME OF THESE REPORTS.

THE HON. THEO. BRANTLY, Chief Justice.
THE HON. SYDNEY SANNER,
THE HON. WILLIAM L. HOLLOWAY, } **Associate Justices.**

OFFICERS OF THE COURT:

***S. CLARENCE FORD, Attorney General.**
FRANK WOODY, Asst. Attorney General.
R. L. MITCHELL, Asst. Attorney General.
ALBERT A. GROBUD, Asst. Attorney General.
JAMES T. CARROLL, Clerk.
MARSHALL N. RACE, Marshal.
AUGUST C. SCHNEIDER, Court Stenographer.

***Elected November 7, 1916, to succeed Joseph B. Poindexter.**

ATTORNEYS AND COUNSELORS AT LAW.

Admitted from December 4, 1916, to July 9, 1917.

ABERNETHY, H. A., May 7, 1917.

ABONSON, AXEL T., June 12, 1917.

BACON, WILLIAM C., June 12, 1917.

BAREFOOT, CHAS. R., February 13, 1917.

BENNETT, ORRIS, January 15, 1917.

BOYINGTON, FLOYD A., May 7, 1917.

BRANDMEIER, JOHN F., May 7, 1917.

BUNSTON, H. W., March 13, 1917.

BURKE, J. E., July 2, 1917.

BURKE, T. H., January 8, 1917.

BURKE, W. J., July 9, 1917.

BYRNE, E. W. JR., July 9, 1917.

CARMODY, GEO. C., June 12, 1917.

CLEARY, GEO. E., February 7, 1917.

CLINE, EARL V., February 13, 1917.

CONNOLLY, J. E., December 18, 1916.

COUESOLLE, N. M., April 10, 1917.

CUNNINGHAM, R. E., December 11, 1916.

DAVIS, HORACE S., January 2, 1917.

DE BARDELEBEN, J. ARTHUR, May 14, 1917.

DICK, R. L., June 12, 1917.

EMIGH, JOHN F., December 19, 1916.

FARLEY, ALFRED E., June 12, 1917.

FERNCASE, HENRY G., April 2, 1917.

FRAZY, G. S., January 20, 1917.

FRIDAY, R. C. M., June 11, 1917.

GEORGIADES, J., June 12, 1917.

GOLDSMITH, W. A., February 26, 1917.

GRAHAM, JOHN C., July 9, 1917.

GREGG, JOHN P., March 26, 1917.

HAYS, JOHN T., May 21, 1917.

HODSON, CHAS. M., May 28, 1917.

HOFFMAN, DONALD, January 26, 1917.

HOLZMAN, MATTHIAS M., December 18, 1916.

IRVINE, THOS. B., July 2, 1917.

JENKINS, R. D., July 2, 1917.

JOHNSON, HOWARD A., July 2, 1917.

JONES, GRANVILLE, February 19, 1917.

JUDSON, HORACE W., January 22, 1917.

KEERAN, JOHN F., July 2, 1917.

LAMB JOSEPH E., February 6, 1917.

LAMBERT, H. T. July 2, 1917.

LONG, WILLIAM G., January 8, 1917.

MCCAMENT, GEO. G., March 26, 1917.

MCGRATH, DANIEL J., January 29, 1917.

McKELVY, CHARLES L., April 10, 1917.

MARX, WILLIAM, April 30, 1917.

MOUM, ERICK, January 8, 1917.

NELSON, ALBERT L., December 19, 1916.

ORE, GEORGE D., April 10, 1917.

O'SULLIVAN, E., February 5, 1917.

PACKER, BERT, May 21, 1917.

POPE, WALTER L., January 2, 1917.

RICKMIRE, A. P., December 4, 1916.

RIORDAN, BENJAMIN R., July 2, 1917.

ROSCOE, JESSIE, June 12, 1917.

ROWAN, CLYDE C., December 18, 1916.

SHILTON, EARLE A., December 18, 1916.

SHONE, ALFRED G., December 18, 1916.

SKULASON, S. G., December 22, 1916.

SLOAN, J. F., January 26, 1917.

SMITH, FREDERICK P., April 2, 1917.

SPENCER, B. L., February 19, 1917.

SPRINGER, GEORGE T., February 19, 1917.

STRAWMAN, C. M., December 21, 1916.

TALCOTT, WARREN E., December 18, 1916.

TOOLE, EDWIN W., July 3, 1917.

TRESSSEL, H. S., January 26, 1917.

TYMAN, CHARLES L., July 2, 1917.

VAN WAGENEN, ANTHONY, JR., December 18, 1916.

VIA, BENJAMIN S., January 16, 1917.

WELLIVER, RALPH L., February 26, 1917.

WHINNEY, CLINTON T., June 28, 1917.

DIRECTORY
OF THE
JUDICIAL DISTRICTS OF THE STATE OF MONTANA.
1917.

FIRST JUDICIAL DISTRICT.

County of Lewis and Clark. County Seat, Helena.
District Judges: Hon. R. Lee Word; Hon. W. H. Poorman.
Officers: County Attorney: Lester H. Loble, Esq.
Clerk of District Court: F. L. Reece.
Sheriff: Edward J. Majors.

SECOND JUDICIAL DISTRICT.

County of Silver Bow. County Seat, Butte.
District Judges: Hon. John V. Dwyer; Hon. J. J. Lynch; Hon.
J. B. McClernan.
Officers: County Attorney: Jos. R. Jackson, Esq.
Clerk of District Court: Otis Lee.
Sheriff: Jno. K. O'Rourke.

THIRD JUDICIAL DISTRICT.

Counties of Deer Lodge, Powell and Granite.
District Judge: Hon. George B. Winston.
Officers of Deer Lodge County (County Seat, Anaconda):
County Attorney: David H. Morgan.
Clerk of District Court: James White.
Sheriff: L. L. Hartsell.

Officers of Powell County (County Seat, Deer Lodge) :

County Attorney: W. E. Keeley, Esq.

Clerk of District Court: Robert Midtlyng.

Sheriff: Thos. Mullen.

Officers of Granite County (County Seat, Philipsburg) :

County Attorney: R. Lewis Brown.

Clerk of District Court: Wm. B. Calhoun.

Sheriff: Fred. C. Burks.

FOURTH JUDICIAL DISTRICT.

Counties of Mineral, Missoula, Ravalli and Sanders.

District Judges: Hon. A. L. Duncan; Hon. R. Lee McCulloch;
Hon. Theodore Lentz.

Officers of Mineral County (County Seat, Superior) :

County Attorney: Ivan E. Merrick.

Clerk of District Court: Ira Nichols.

Sheriff: Chas. Hoffman.

Officers of Missoula County (County Seat, Missoula) :

County Attorney: Fred. R. Angevine, Esq.

Clerk of District Court: Harry Rawn.

Sheriff: J. T. Green.

Officers of Ravalli County (County Seat, Hamilton) :

County Attorney: E. C. Kurtz, Esq.

Clerk of District Court: J. T. Coughenour.

Sheriff: Ike Wylie.

Officers of Sanders County (County Seat, Thompson Falls) :

County Attorney: Wade R. Parks, Esq.

Clerk of District Court: Wm. Strom.

Sheriff: Joseph L. Hartman.

FIFTH JUDICIAL DISTRICT.

Counties of Beaverhead, Jefferson and Madison.

District Judges: Hon. Joseph C. Smith; Hon. W. A. Clark.

Officers of Beaverhead County (County Seat, Dillon):

County Attorney: Wilber G. Gilbert, Esq.

Clerk of District Court: Fred Rife.

Sheriff: C. K. Wyman.

Officers of Jefferson County (County Seat, Boulder):

County Attorney: J. E. Kelly, Esq.

Clerk of District Court: W. B. Hundley.

Sheriff: T. L. Locker.

Officers of Madison County (County Seat, Virginia City):

County Attorney: Geo. R. Allen, Esq.

Clerk of District Court: Matt Carey.

Sheriff: Clarence W. Hungerford.

SIXTH JUDICIAL DISTRICT.

Counties of Park, Stillwater and Sweet Grass.

District Judge: Hon. Albert P. Stark.

Officers of Park County (County Seat, Livingston):

County Attorney: E. M. Niles, Esq.

Clerk of District Court: Wm. Pethybridge.

Sheriff: A. S. Robertson.

Officers of Stillwater County (County Seat, Columbus):

County Attorney: B. E. Berg, Esq.

Clerk of District Court: G. B. Iverson.

Sheriff: Edward B. Fellows.

Officers of Sweet Grass County (County Seat, Big Timber):

County Attorney: John B. Selters, Esq.

Clerk of District Court: H. C. Pound.

Sheriff: H. G. Lyons.

SEVENTH JUDICIAL DISTRICT.

Counties of Dawson, Richland and Wibaux.

District Judge: Hon. C. C. Hurley.

Officers of Dawson County (County Seat, Glendive):

County Attorney: Albert Anderson, Esq.

Clerk of District Court: Frank Parrett.

Sheriff: Geo. Twibble, Jr.

Officers of Richland County (County Seat, Sidney):

County Attorney: Carl L. Brattin, Esq.

Clerk of District Court: Guy L. Rood.

Sheriff: Fred. D. Sullivan.

Officers of Wibaux County (County Seat, Wibaux):

County Attorney: Geo. P. Jones, Esq.

Clerk of District Court: A. E. Jeffers.

Sheriff: J. W. Jones.

EIGHTH JUDICIAL DISTRICT.

Counties of Cascade, Teton, and Toole.

District Judges: Hon. Jere B. Leslie; Hon. Harry H. Ewing.

Officers of Cascade County (County Seat, Great Falls):

County Attorney: Geo. A. Judson, Esq.

Clerk of District Court: Geo. Harper.

Sheriff: Louis H. Kommers.

Officers of Teton County (County Seat, Chouteau):

County Attorney: Walter L. Verge, Esq.

Clerk of District Court: Paul Jacobson.

Sheriff: William Miller.

Officers of Toole County (County Seat, Shelby):

County Attorney: W. M. Black, Esq.

Clerk of District Court: Perry J. Day.

Sheriff: J. S. Alsup.

NINTH JUDICIAL DISTRICT.

County of Gallatin. County Seat, Bozeman.

District Judge: Hon. Ben. B. Law.

Officers: County Attorney: C. E. Carlson, Esq.

Clerk of District Court: W. L. Hays.

Sheriff: D. E. Gray.

TENTH JUDICIAL DISTRICT.

County of Fergus. County Seat, Lewistown.

District Judge: Hon. Roy E. Ayers.

Officers: County Attorney: Stewart McConochie, Esq.

Clerk of District Court: James L. Martin.

Sheriff: John H. Stephens.

ELEVENTH JUDICIAL DISTRICT.

Counties of Flathead and Lincoln.

District Judge: Hon. T. A. Thompson.

Officers of Flathead County (County Seat, Kalispell):

County Attorney: T. H. MacDonald, Esq.

Clerk of District Court: R. N. Eaton.

Sheriff: J. H. Metcalf.

Officers of Lincoln County (County Seat, Libby):

County Attorney: Benjamin F. Maiden, Esq.

Clerk of District Court: Timothy Miller.

Sheriff: Waverly L. Brown.

TWELFTH JUDICIAL DISTRICT.

Counties of Blaine, Chouteau and Hill.

District Judge: Hon. John W. Tattan.

Officers of Blaine County (County Seat, Chinook):

County Attorney: D. J. Sias, Jr., Esq.

Clerk of District Court: A. W. Ziebarth.

Sheriff: Jas. Buckley.

Officers of Chouteau County (County Seat, Fort Benton):

County Attorney: J. A. Kavaney, Esq.

Clerk of District Court: Geo. D. Patterson.

Sheriff: B. B. Crawford.

Officers of Hill County (County Seat, Havre):

County Attorney: V. R. Griggs, Esq.

Clerk of District Court: Geo. W. Glass.

Sheriff: Geo. Bickle.

THIRTEENTH JUDICIAL DISTRICT.

Counties of Carbon, Big Horn and Yellowstone.

District Judges: Hon. Chas. A. Taylor; Hon. A. C. Spencer.

Officers of Carbon County (County Seat, Red Lodge):

County Attorney: H. A. Simmons, Esq.

Clerk of District Court: G. L. Finley.

Sheriff: George Headington.

Officers of Big Horn County (County Seat, Hardin):

County Attorney: Julian Terrett, Esq.

Clerk of District Court: Frank A. Nolan.

Sheriff: John H. Kifer.

Officers of Yellowstone County (County Seat, Billings):

County Attorney: Jas. L. Davis, Esq.

Clerk of District Court: Fred Inabnit.

Sheriff: S. W. Matlock.

FOURTEENTH JUDICIAL DISTRICT.

***Counties of Meagher, Broadwater and Wheatland.**

District Judge: Hon. John A. Matthews.

Officers of Meagher County (County Seat, White Sulphur Springs):

County Attorney: H. E. Hagerman, Esq.

Clerk of District Court: Geo. H. Bell.

Sheriff: Geo. B. Nagues.

Officers of Broadwater County (County Seat, Townsend):

County Attorney: Fred. W. Schmitz, Esq.

Clerk of District Court: Fred Bubser.

Sheriff: Harry A. Crittenten.

Officers of Wheatland County (County Seat, Harlowton):

County Attorney: L. D. Glenn, Esq.

Clerk of District Court: A. T. Anderson.

Sheriff: Dominic Grivetti.

FIFTEENTH JUDICIAL DISTRICT.

Counties of Rosebud and Musselshell.

District Judge: Hon. Chas. L. Crum.

Officers of Rosebud County (County Seat, Forsyth):

County Attorney: F. F. Haynes, Esq.

Clerk of District Court: D. J. Muri.

Sheriff: Henry Grierson.

Officers of Musselshell County (County Seat, Roundup):

County Attorney: W. W. Mercer, Esq.

Clerk of District Court: W. G. Jarrett.

Sheriff: Chas. C. Hopkins.

***Wheatland county created by Act of the Fifteenth Legislative Assembly (Chapter 55, Laws 1917).**

SIXTEENTH JUDICIAL DISTRICT.

*Counties of Custer, Fallon, Prairie and Carter.

District Judge: Hon. Daniel L. O'Hern.

Officers of Custer County (County Seat, Miles City):

County Attorney: Frank Hunter, Esq.

Clerk of District Court: C. A. Lindeberg.

Sheriff: Austin B. Middleton.

Officers of Fallon County (County Seat, Baker):

County Attorney: Chas. J. Dousman, Esq.

Clerk of District Court: Ralph Keener.

Sheriff: M. E. Jones.

Officers of Prairie County (County Seat, Terry):

County Attorney: Joseph C. Tope, Esq.

Clerk of District Court: W. A. Cameron.

Sheriff: W. A. Johnson.

Officers of Carter County (County Seat, Ekalaka):

County Attorney: L. L. Wheeler, Esq.

Clerk of District Court: L. J. O'Grady.

Sheriff: Geo. S. Boggs.

SEVENTEENTH JUDICIAL DISTRICT.

Counties of Phillips, Valley and Sheridan.

District Judge: Hon. John Hurly.

Officers of Phillips County (County Seat, Malta):

County Attorney: F. C. Gabriel, Esq.

Clerk of District Court: C. M. Porter.

Sheriff: J. R. Crabb.

Officers of Valley County (County Seat, Glasgow):

County Attorney: Carl D. Borton, Esq.

Clerk of District Court: Walter Shanley.

Sheriff: C. W. Powell.

Officers of Sheridan County (County Seat, Plentywood):

County Attorney: L. J. Onstad, Esq.

Clerk of District Court: O. R. Girard.

Sheriff: Jack Bennett.

*Carter county created by Act of the Fifteenth Legislative Assembly (Chapter 56, Laws 1917).

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RULES
OF THE
SUPREME COURT
OF THE
STATE OF MONTANA

In Force From and After April 14, 1917.

I.

RECORD OF COMMISSIONS AND OATHS.

1. Commissions and Oaths.—The commissions and oaths of the Justices and Clerk of this Court, and the Attorney General, shall be recorded in the records of this Court.

2. Minutes of Court.—The minutes of this Court shall be approved by the Chief Justice (or in his absence by the senior Associate Justice), and attested by the Clerk.

II.

ORIGINAL PROCEEDINGS.

1. How Commenced and Conducted.—Proceedings commenced in this Court originally to obtain writs of *habeas corpus*, injunction, review, mandate, *quo warranto*, and other remedial writs or orders, shall be commenced and conducted in the manner prescribed by the Code of Civil Procedure for the conduct of such proceedings in the District Court.

2. Application, What to Contain.—The application for the issuance of any of the above writs or orders, except *habeas corpus*, must set forth, in addition to the other requisite matters, the reasons which render it necessary that the writ should issue originally from this Court, and the sufficiency or insuffi-

ciency of the reasons so set forth will be determined by the Court in awarding or refusing the writ or order.

3. Certiorari, Application, What to Contain.—An application for a writ of review shall set out a copy of the judgment or order sought to be annulled or modified.

4. Applications, Where Filed.—In all proceedings and actions commenced in this Court originally, the plaintiff shall file his application with the Clerk of this Court prior to its presentation to this Court.

5. Briefs, Preparation and Filing.—In all proceedings and actions commenced in this Court originally each party shall file with the Clerk of this Court at or before the time set for final hearing, eight copies of the brief of his argument, containing a recital of the facts and exhibiting a clear statement and orderly arrangement of the points of law to be discussed and the authorities relied upon in support of each point. Said brief shall be printed in conformity to the requirements of Subdivision 1 of Rule X of this Court, unless, upon application and for good cause shown, the Court order otherwise. A failure to comply with the requirements of this subdivision may result in a dismissal of the proceedings or action, or a refusal to hear the party in default.

6. Hearing, When Had.—Unless otherwise ordered, the hearing of an original proceeding or action will be had on the return day.

7. Applications, How Made.—Applications to this Court for writs or orders must be presented by the parties in person, or by counsel, and in open Court; under no circumstances will the Court entertain such applications when made through the medium of the Clerk;

Provided, Always, that motions to advance, to reinstate, to dismiss, to affirm, to modify, to strike out, to tax or to allow costs, to quash, for rehearings, to correct the transcript, motions based upon suggestions of diminution of the record, motions for substitution of parties, and motions touching the

time of filing or serving briefs, may be presented by filing the same with the Clerk, and will be considered in regular order.

III.

CERTIFICATE OF PROBABLE CAUSE.

Application, How and upon What Made.—Application for the certificate of probable cause provided for in Section 9403, Revised Codes, may be made to a Justice of this Court only after application and refusal thereof by the Judge of the Court in which the conviction was had, or upon proof of his absence, or inability to act, and upon at least three days' notice to the County Attorney. The applicant shall produce at the hearing the record on appeal.

IV.

APPEALS IN CIVIL CASES.

1. Record on Appeal.—Appellant is charged with the duty of having the transcript perfected and filed with the Clerk of this Court, in accordance with the statute and these Rules.

2. Time of Filing.—The transcript shall be filed by the appellant with the Clerk of this Court within sixty days after such appeal is perfected; or the appeal will be subject to dismissal on motion of the adverse party; but if it appear that the delay has been without laches on the part of appellant, his appeal will not be dismissed for such delay, until reasonable time is allowed for filing the record.

3. Motion to Dismiss for Laches.—A motion to dismiss an appeal for failure to file the record within the time required, shall be accompanied by a certified copy of the notice of appeal, and *praecipe*, if one has been filed; and a certificate of the Clerk of the Trial Court, showing whether the case was originally instituted in the District Court, or was there on appeal from an inferior court, and the nature, amount and date of judgment or order appealed from; the date of filing notice and undertaking on appeal; the date of service of such notice, and whether appellant has requested or received a duly

certified transcript, and the time of such request, or delivery thereof, as the case may be. No appeal shall be dismissed for failure to file the record within the time required by these Rules, unless the motion to dismiss shall have been filed, and notice thereof given to the appellant, prior to the filing of the record.

4. Suggestion of Diminution by Appellant.—Nor shall the appeal be dismissed because the transcript is imperfect, it not being prepared as directed by the *praecipe*; but this Court will on suggestion of diminution, order the Clerk of the Trial Court to correct the transcript, or supply the portions lacking, as the case may require.

Same, by Respondent.—Respondent may likewise make suggestion of diminution of record in any respect he may deem necessary; whereupon if the suggestion appears to be proper, an order will be made requiring such parts of the record suggested to be certified to this Court.

5. Correction of Error in Record.—Either party may, in writing, suggest error or defect, wherein the transcript does not conform to the original, and, upon notice to the adverse party, obtain an order of this Court requiring the Clerk of the Trial Court having in custody the original record, either to compare and correct the transcript on file in this Court, or to certify a supplemental transcript of such parts of the record as may be thus questioned. If such error or defect be disputed by the adverse party, the suggestion must be verified in the manner required by law for verification of pleadings.

Notice to Adverse Party.—Applications under Sections 4 and 5 of this Rule shall be made upon five days' notice to the adverse party.

V.

PROOF OF EXCEPTIONS.

Application, How Made.—In case any Judge of the District Court fail or refuse, upon proper presentation of request, to

allow, settle, and certify an exception, or statement of the case, in accordance with the facts and the law and practice in such cases, the party aggrieved may, within twenty days thereafter, present to this Court, or any two Justices thereof, a petition verified by the oath of the party aggrieved, or his attorney, setting forth the facts in relation to such failure or refusal; and thereupon this Court, or such Justices thereof, will, if sufficient grounds appear therefor, issue an order granting leave to the petitioner to prove before a referee to be named in such order, or by depositions, to be taken in the manner prescribed by statute, the fact in relation to such exception, or bill of exceptions, or statement of the case, and the failure or refusal to allow, certify or settle the same.

Copy of Order—Service.—A copy of such order must be served on the adverse party to the action or proceeding, wherein such failure or refusal is alleged to have occurred, or his attorney, together with the notice of the time and place of taking such testimony.

VI.

TRANSCRIPTS—HOW PREPARED.

1. Civil Cases.—In all civil cases wherein insufficiency of the evidence to justify the verdict or decision of the Court is relied upon by the appellant, the transcripts shall be printed on unruled white, uncalendered book paper, ten inches long by seven inches wide, with a margin on the outer edge not less than two inches wide. Small pica solid is the smallest letter and most compact form of composition allowed.

2. Criminal Cases.—In all criminal cases, and in all civil cases except as specified in Subdivision 1 above the transcripts shall be plainly written with a typewriter with record ink, on one side on white typewriter paper, eight and one-half inches wide and thirteen inches long, with a margin of one and one-half inches on the left hand side of the page, and securely fastened at the side, and shall be bound in black pasteboard covers. In no case shall carbon copies be filed in this Court.

VII.

ARRANGEMENT OF TRANSCRIPT.

1. First Page and Cover.—On the first page and cover of all transcripts must be stated the title of this Court, the title of the case in the Court below (substituting for the words “Plaintiff” and “Defendant,” the words “Appellant” and “Respondent,” as the case may require), the names of counsel for appellant and respondent, and the words “Transcript on Appeal,” followed by a statement of the District and County from which the appeal is taken. The first paper in all transcripts must state the title of the Court and the case as in the Court below but from all the following papers, orders or proceedings it must be omitted, and the name of the paper, order or proceeding simply given.

2. Arrangement and Index.—The transcript shall be chronologically arranged, and contain an index, showing the page of each pleading, document, exhibit, order and proceeding, and the testimony or affidavit of each witness comprised therein.

Paging.—Each transcript must be paged at the top and the lines numbered on the left margin of the page, except that in printed transcripts only every tenth line need be numbered.

3. Testimony to be in Narrative Form—When to be Presented by Question and Answer.—Unless otherwise ordered by the District Court, the testimony shall be reduced to narrative form, and if not so reduced may be stricken out; *Provided*, however, that in equity cases and in matters and proceedings of an equitable nature, wherein questions of fact arising upon the evidence presented in the record are to be submitted for review by this Court, the testimony relating to such questions shall be presented by question and answer.

4. Identification of Matter Referred to in Exceptions or Motions.—Where an exception refers to matters in pleadings, evidence or other proceedings, which the Court struck out, or refused to strike out, on motion, such exception must recite the matter in question.

5. Summons, Writs and Formal Parts of Papers Omitted.—In no case shall the summons or other process or writ be inserted in a transcript unless a question arise in respect to the same. Unless some question is predicated upon the formal parts of pleadings, motions, depositions, exhibits or other papers filed in the Trial Court, and made part of the record on appeal, the same must be omitted in preparing the record, after once stating the venue and title, giving the names of the parties in full, and thereafter the venue and title may be indicated by the words “Title of Case” and likewise.

a. Formal Parts of Depositions.—Notices, interrogatories, certificates of officers taking depositions, signatures of witnesses, etc., may be omitted, the substance of the testimony contained in the deposition being reduced to narrative form.

b. Same, Deeds, Mortgages, etc.—So with deeds, mortgages, contracts and other exhibits, the endorsement thereon of certificates of acknowledgment and recording may be omitted, and only the material part stated.

c. Same, Endorsements.—All endorsements made by officers may be omitted in preparing the record, except the date of the filing of papers in the Trial Court, which ought to appear in the record by simply noting “Filed....,” giving the date of filing.

d. Repetition of Papers.—No paper shall be printed or written in the transcript more than once. Instead of repetition, appropriate reference may be made.

6. Strict Compliance—Penalty—Dismissal.—A strict compliance with the foregoing requirements will be exacted in all cases, whether objection be made by the opposite party or not; and for any violation or neglect in these respects which is found to obstruct the examination of records, the appeal may be dismissed, or the Court may order the offending party to pay the costs of such transcript, or any part thereof, unless the matter objected to is inserted by order of the Court or Judge below.

VIII.

ORIGINAL EXHIBITS.

1. **Incorporation of, in Record—Withdrawal.**—Whenever in the trial of an action or other proceeding appealed to this Court, an exhibit of a printed book or pamphlet or other printed or engraved matter, or a model, drawing, map, trademark, plan or illustration, or other matter formed, drawn, printed or engraved, has been introduced or offered in evidence and it is desired by either party to use the same original exhibit as part of a statement of the case, or in a bill of exceptions, such exhibit, authenticated by a certificate of the Judge of the Trial Court thereon or attached thereto, may be brought to this Court in its original form as introduced in evidence, either bound in the transcript of the record on appeal, if convenient to do so, or as an exhibit accompanying such record to this Court. Any such exhibit bound in the record filed in this Court shall not be withdrawn; but any such exhibit not bound in the record may be withdrawn after determination of the case, by order of the Court or any Justice thereof.

2. **Copies—When Production of Original may be Ordered.**—Whenever the record contains a transcript of any document, writing, map, drawing, engraving, or printed matter, which was introduced in evidence, in a case brought to this Court on appeal, and it is deemed expedient to have the same here for examination in the original form, an order will be made requiring the officer or party having the same in custody to place such original exhibit in the custody of the Clerk of this Court. Any such exhibit may be withdrawn by the party entitled to the custody thereof, after determination of the appeal, by application to the Clerk of this Court.

IX.

SERVICE AND FILING OF TRANSCRIPTS.

1. **Civil Appeals.**—In all civil cases the transcript shall be filed, and a copy thereof served upon the adverse party or

his attorney within five days after filing the same, and if there be more than one adverse party appearing by different attorneys, on each party or the attorney of each party so appearing.

2. Printed Record—Authentication.—In cases where transcripts are required to be printed, a duly authenticated printed copy thereof shall constitute the record of the case in this Court.

3. Same—Copies for Justices.—When transcripts are printed, a copy shall be lodged with the Clerk for each of the Justices.

4. Criminal Appeals.—In criminal cases no copies of the transcript need be served.

X.

BRIEFS.

1. Kind of Paper—Size.—Briefs shall be printed upon paper of the same character, with type of the same size, and the pages shall be of the same dimensions, as provided by these Rules with respect to transcripts, which are required to be printed.

2. Time of Filing and Service—Number of Copies.—The counsel for appellant shall file with the Clerk of this Court eight copies, and serve on opposing counsel one copy of the printed brief, within forty-five days after the transcript is filed in this Court, except in cases advanced on the calendar, in which case briefs shall be filed and served within such time as may be ordered by the Court in the order of advancement.

3. Contents of Appellant's Brief.—The appellant's brief shall contain, in the order here stated:

a. Statement of Case.—A concise abstract or statement of the case, presenting succinctly the questions involved, and the manner in which they are raised. The abstract shall refer to the page numbers in the transcript in such manner that pleadings, evidence, orders and the judgment may be easily found; *Provided*, that in cases in which the transcripts

are not printed, the briefs shall contain so much of the record as is necessary to make out the appellant's case, with reference to the transcript by page and marginal numbers.

b. Specification of Error.—A specification of errors relied upon, which shall be numbered and shall set out separately and particularly each error intended to be urged. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the Court, the specification shall set out the part referred to *totidem verbis*, whether it be instructions given or instructions refused.

c. Argument—References to Pages of Record.—A brief of the argument, exhibiting a clear statement of the points of law to be discussed, with a reference to the page of the record, and the authorities relied upon in support of each point.

d. Citations, How Made.—Citation of authorities shall be by title of case, and volume and page of report.

e. Amendments.—After the brief on behalf of the appellant has been filed, no motion for leave to amend the same by inserting therein, or adding thereto, any specification of error, or by incorporating new matter of substance in the statement or abstract of the case, will be entertained. By consent of respondent in writing, and without leave of Court, the brief may be amended in the particulars mentioned or in any other respect, or a new brief may be filed at any time before the cause is submitted. The court will, in proper cases, upon reasonable application and upon such terms as it may prescribe, permit the brief to be amended, or a new brief filed, so as to meet the requirements of Subdivision 1 and of Paragraphs *c* and *d* of this subdivision. Upon its own motion, and in its discretion, the Court may at any time order a brief to be amended or changed in any particular, or a new brief filed.

4. Respondent's Brief—Copies—Filing and Service.—Counsel for respondent shall file with the Clerk, eight printed copies of his brief and serve one upon counsel for appellant within

forty-five days after appellant's brief shall have been served upon him. His brief shall be of like character with that required of appellant, omitting any specification of errors, and a statement of the case, unless that presented by the appellant is controverted.

5. Failure to File Briefs—Effect.—When, according to this Rule, appellant is in default, the case may be dismissed on motion; and when a respondent is in default, he will not be heard except on consent of his adversary or by request of the Court.

6. Filing—Extension of Time.—No extension of time for filing briefs shall be allowed, except upon a showing that such extension is necessary.

7. Service on Attorney General.—In all cases wherein the Attorney General is required, by virtue of his office, to appear, five copies of the brief of opposing counsel shall be served upon the Attorney General.

XI.

ORAL ARGUMENT.

Time Allowed to Each Party.—One hour will be allowed to appellant and fifty minutes to respondent for argument and no more, without special leave of Court granted before the argument begins.

XII.

CALENDAR.

1. Cases, How Docketed.—Cases shall be placed upon the calendar by the Clerk in the order in which they are filed and docketed.

2. Setting Cases for Argument.—As often as found convenient, cases will be set for argument by the Court, as reached in the order in which they stand upon the docket, except such cases as are determined to be entitled to precedence, or as otherwise ordered by the Court.

3. Advancement of Cases.—Appeals in criminal cases; appeals from orders dissolving, or refusing to dissolve, granting or refusing to grant writs of injunction; appeals from orders dissolving or refusing to dissolve attachments; appeals from orders appointing or refusing to appoint receivers; appeals from orders or judgments holding appellant in custody; and all original proceedings, are entitled to precedence, and will, upon motion of either party, be advanced on the calendar.

4. Short Cause Calendar.—There will be placed upon the short cause calendar, any case in which it is made to appear to the satisfaction of the Court that the same can be presented in oral argument of fifteen minutes on each side.

5. Submission on Briefs.—Cases on appeal may be submitted on briefs at any time by filing stipulation of counsel to that effect, which cases will then be considered and determined.

XIII.

PETITIONS FOR REHEARING.

Petition—Time for Filing—Service of Copy—Consideration Without Argument.—Petitions for rehearing, stating the grounds, points and authorities relied on, may be filed within fifteen days after the decision of the Court, and a copy thereof served upon the adverse party, who may present objections thereto within ten days after such service. The petition for rehearing will be considered without argument.

XIV.

SUBMISSIONS OF MOTIONS.

1. Motions to be Filed and Copy Served.—All motions shall be printed or typewritten, stating the grounds thereof, and filed, and a copy served on counsel for adverse party, if any counsel has entered an appearance; otherwise on the Clerk of the Court for the party or counsel.

2. Motions Determined Without Argument.—Unless otherwise ordered, a motion will be considered and disposed of without argument.

3. Motions — Preparation—Service—Briefs in Reply.—Motions shall be printed or typewritten, accompanied by citation of authorities relied on, and filed; and copy thereof served on the adverse party at least ten days before the time set for hearing on the merits, or within such time as may be fixed by the Court. Thereupon the adverse party may, within ten days after the service thereof, or within such time as may be allowed by the Court, file and serve on the others his brief in opposition to the motion. Such motion shall then be considered and disposed of by the Court without argument.

XV.

PERMISSION TO TAKE RECORD FROM CLERK'S OFFICE.

Records of Court—Time Within Which to be Returned.—The records and other papers of this Court shall not be taken therefrom except by counsel, on permission of the Clerk, and when so taken shall not be retained out of the Clerk's office more than ten days in any case, and shall be returned within a shorter period upon notice.

XVI.

PROCEDURE IN CASE OF DEATH, DISABILITY OR TRANSFER OF INTEREST.

Substitution of Parties.—In event of the death, disability or transfer of interest of a party to an appeal pending in this Court, such fact shall be suggested in writing, and (unless the cause of action abate) the legal representative of the party deceased or disabled, or successor to the party transferring his interest, shall, on motion, be substituted.

XVII.

COST OF APPEAL.

To Whom Taxed.—In all cases the costs of appeal shall be taxed against the unsuccessful party, unless otherwise ordered

by this Court, and the *remittitur* shall be accompanied by an itemized statement of such costs as are paid to the Clerk of this Court. *Provided*, that whenever it is made to appear that the successful party has caused to be incorporated in any bill of exceptions or statement of the case, any redundant or useless matter, he shall not recover as part of his costs the expense of printing so much of the transcript as is occupied by such redundant or useless matter.

Remittitur—Contents.—In all such cases the Clerk of this Court shall, unless otherwise directed by the Court, include in the order or judgment of affirmance, reversal or modification, and in the *remittitur*, a clause awarding the costs of appeal to the prevailing party, appellant or respondent, to be recovered of the unsuccessful party after ascertainment or taxation thereof in the Court below in the manner prescribed by law.

XVIII.

ASSESSMENT OF DAMAGES FOR APPEAL WITHOUT MERIT.

Frivolous Appeals—Penalty.—If the Court is satisfied from the record, and the presentation of the appeal, that the same was taken without substantial or reasonable grounds, but apparently for purposes of delay only, such damages may be assessed on determination thereof, as under the circumstances are deemed proper.

XIX.

JUDGMENT BOOK.

Contents.—The Clerk of the Court shall keep a book to be known as the “Judgment Book,” in which he shall enter all judgments rendered in actions and proceedings originally instituted in this Court.

XX.

REMITTITUR, WHEN ISSUED.

Time for Issuance.—*Remittitur* may, in cases where it is deemed proper, be ordered forthwith; otherwise the same shall

be issued on application at any time fifteen days after decision unless motion for rehearing or modification of judgment or order has been made.

Copy of Opinion to Accompany, When.—A copy of the opinion must accompany the *remittitur* when the judgment or order of the Trial Court is reversed or modified and the case remanded for further proceedings other than the entry of a final judgment or order determining the proceedings in the Trial Court.

XXI.

MANDATE FROM UNITED STATES SUPREME COURT— PROCEDURE THEREON.

Remittitur — What to Contain.—Upon the receipt by the Clerk of this Court of a mandate from the Supreme Court of the United States in any case at law or in equity, theretofore taken from this Court by writ of error to said Supreme Court, it shall be the duty of said Clerk forthwith to issue under his hand and seal of this Court a *remittitur* to the District Court of the District and County in which the judgment was rendered, commanding such Court to take such action in the premises as by the mandate shall be proper, and said *remittitur* shall also contain therein a recital *in haec verba* of the said mandate, and all the costs subsequent to the appeal from said District Court shall be taxed in such *remittitur*.

XXII.

'APPEALS FROM INJUNCTION ORDERS.

Injunctions Pending Appeal—Procedure—Upon appeal from an order dissolving or refusing an injunction, if the appellant desires to continue in force the injunction order dissolved by the District Court, or to obtain such an injunction order pending the appeal, he shall file in this Court his sworn application, setting forth the proceedings appealed from, and the relief desired, and present with it to this Court a verified copy of the affidavits or evidence used on the hearing in the Court below.

Such application will be heard *ex parte* and without argument, and the Court, upon such record will make such order in the premises as may be proper.

XXIII.

SUBSTANTIAL COMPLIANCE WITH RULES.

Substantial Compliance With Rules—Unsubstantial Departures—Treatment in Opinions of Court.—Substantial compliance with the foregoing Rules will be required; *Provided*, however, that any departure from the Rules regarding the arrangement of transcripts and briefs that is not substantial in character and not such as to retard or embarrass the Court in the consideration of the cause, will not be regarded, and it shall not be necessary in the preparation of opinions to make mention of motions founded upon such unsubstantial departures.

ADMISSION OF ATTORNEYS.

A. UPON EXAMINATION.

1. **Examination.**—Examinations for admission to the Bar will be conducted by the State Board of Law Examiners, in the senate chamber at the capitol at ten o'clock A. M. on the first Wednesday of June and December of each year.

2. **Application.**—A person desiring to enter for examination must, at least thirty days prior to the date of such examination, file with the clerk of the Supreme Court his verified petition setting forth that he is a citizen or person resident of this state who has *bona fide* declared his intention to become a citizen in the manner required by law; that he is of the age of twenty-one years, that he has diligently pursued the study of law at least two successive years (twenty-four months) prior to making such application and if admitted to the bar that it is his intention to engage actively in the practice of the law in this state. He shall also file with his petition a certificate by two reputable attorneys of this state (or the affidavits of two nonresident attorneys) that he has been engaged in the study of law for two successive years prior to the date when the application is made. He shall also file with his petition the affidavit of each of three responsible citizens, two of whom must be members of the bar, stating that the applicant is a person of good moral character, which affidavit must set forth how long a time, when and under what circumstances affiant has known the applicant. He shall also present satisfactory evidence that he possesses the necessary qualifications for entrance to the collegiate department of the State University of Montana or the equivalent.

3. **Publication.**—The clerk of the Supreme Court shall cause the list of applicants to be published once in some newspaper in the city of Helena, at least twenty days before the date of the examination.

4. Notice.—Ten days prior to the date of the examination the petitions will be passed upon and those entitled to take the examination will be notified by the clerk of the Supreme Court.

5. Scope of Examination.—Candidates will present themselves prepared for examination in the following subjects: Constitutional Law, including the Constitutions of the United States and the State of Montana; Equity; Trusts and Suretyship; the Law of Real and Personal Property; Evidence; Decedents' Estates; Mortgages; Contracts; Partnership; Corporations; Torts; Crimes; Agency; Sales; Negotiable Instruments; Domestic Relations; Master and Servant; Common Law Pleading and Practice; Code Practice; Conflict of Laws; Mining Laws; Water Rights; the Federal Statutes relating to the Judiciary and to Bankruptcy; Professional Ethics, particularly with reference to the Canons of Ethics recommended by the American Bar Association; and the principles of Law as exemplified by the decisions of the Supreme Court of Montana and by Statutory Enactments of the Legislature of Montana.

6. Character of Examination.—The examination will be principally in writing and not more than three days will be allowed to complete work.

7. Oath of Applicant.—Before commencing the examination every applicant must take an oath that he will not seek or accept aid or assistance from anyone in answering questions, or tender or render any such aid or assistance to another; that he will not consult any book or person during any recess and that he will not remove from the room where the examination is held any examination paper or make a copy or copies of the same.

B. FROM OTHER JURISDICTIONS.

1. Who may be Admitted.—Every citizen of the United States, or person resident of this state who has *bona fide* declared his intention to become a citizen in the manner required

by law, who has been admitted to practice law in the highest courts of another state or of a foreign country where the common law of England constitutes the basis of jurisprudence, and where the requirements for admission are substantially equivalent to those of this state, may be admitted to practice in the courts of this state upon the production of his license and satisfactory evidence of good moral character.

2. Application, How Made.—A candidate for admission may make application at any time by filing a petition with the clerk, accompanied by the certificate hereinafter specified, and evidence of his good moral character. The clerk shall forthwith deliver the petition and other papers to the Attorney General. If upon examination by him he is satisfied that the applicant is *prima facie* entitled to admission, he shall thereupon notify the applicant when the court will hear the application. The applicant need not appear until the motion for admission is made. All applications must be made upon motion of the Attorney General or one of his assistants. The petition shall be verified and, in addition to the facts recited in section 6385, Revised Codes, 1907, shall show:

a. Same—Contents.—Where, with whom, and the period of time the petitioner studied law, and where he was first admitted to practice; all places in which, and the period of time he has practiced as attorney or counselor at law elsewhere than in this state; that he has not been out of active practice for more than two years immediately prior to making application, and if admitted to the bar that it is his intention to engage actively in the practice of the law in this state.

b. Same.—Whether or not any proceedings for his disbarment or criminal charges have been instituted or prosecuted against him in any jurisdiction, and if so, a statement of the time, place and circumstances, and the result thereof.

c. Certificate of Judge Before Whom Applicant Last Practiced—Exemplification.—Such petition must be accompanied by a certificate of the presiding judge of the highest Trial

Court of record in which the petitioner last practiced, exemplified as required by the laws of this State for the exemplification of records from another state or foreign country (Sec. 7911, Revised Coes, 1907) showing that the petitioner was of good reputation, and trustworthy in the practice of his profession as attorney and counselor at law in such jurisdiction, which petition and certificate last mentioned shall be filed and preserved in the office of the Clerk of this Court.

d. If the applicant has never practiced and not more than one year has elapsed since his admission, he shall so state and shall furnish the same evidence of good moral character that a candidate for examination is required to furnish.

3. Presence of Applicant in Court.—All such applicants for admission shall be personally present in Court when the motion is made.

4. If for any reason the court is of the opinion that an applicant for admission from another jurisdiction should be required to pass an examination as to his qualifications, if his application in other respects conforms to the requirements for admission of attorneys from other jurisdictions, his name will be entered in the list of candidates for the next ensuing examination.

5. Oath of Office.—Every attorney admitted to practice must before his certificate is issued to him by the Clerk, take an oath to support the Constitution of the United States, and the Constitution of the State of Montana, and to faithfully discharge the duties of an attorney and counselor at law with fidelity, to the best of his knowledge and ability. A certificate of his oath must be endorsed upon the license issued to the attorney, and a duplicate filed with the Clerk.

6. Applicant must Sign Roll of Attorneys.—All attorneys admitted to practice must sign the roll of attorneys kept by the Clerk of the Court, before the license is issued to them.

7. Objection to the Admission of Applicants—How Made.—Objection to the admission of an applicant to practice law in

the courts of this State may be made by any person filing with the Clerk of this Court a statement setting forth the grounds thereof; and thereupon, if such objection is deemed of sufficient weight, investigation thereof will be made in such manner as the Court deems appropriate.

C. FEES FOR ADMISSION.

Every applicant for admission to the Bar by examination or otherwise, must pay to the Clerk of the Supreme Court at the time he files his application for examination or his petition for admission, the sum of Twenty-five Dollars (\$25.00). Should an applicant fail in the examination taken by him, he may take another examination before said Board at any time within one year thereafter without further payment. No other fee shall be exacted for admission of any applicant, if admitted within one (1) year after the payment of the fee of Twenty-five Dollars (\$25.00).

ORDER.

These Rules shall take effect and be in full force from and after 12 o'clock noon, April 14, 1917.

ERRATA.

On page 71, [161 Pac. 518] should be [161 Pac. 521].

On page 268, [163 Pac. 500] should be [163 Pac. 560].

On page 138, line 3 of paragraph 3 of syllabus, strike out "it" after word "sign."

(xlix)

CASES DETERMINED
IN THE
SUPREME COURT
AT THE
OCTOBER TERM, 1916.

THE HON. THEODORE BRANTLY, Chief Justice.

THE HON. SYDNEY SANNER,
THE HON. WILLIAM L. HOLLOWAY, } **Associate Justices.**

**LIVINGSTON WATERWORKS, APPELLANT, v. CITY OF
LIVINGSTON ET AL., RESPONDENTS.**

(No. 3,811.)

(Submitted May 20, 1916. Decided November 10, 1916.)

[162 Pac. 381.]

*Specific Performance — Cities and Towns — Municipal Water-
works Contract—Renewal Agreement—Estoppel.*

Contracts—Agreement to Enter into—Not Enforceable.

1. An agreement to enter into an agreement upon terms to be afterward settled between the parties cannot, as a general rule, be enforced.

[As to reference by contracting parties to future contract in working as negating existence of present contract, see note in *Ann. Cas.* 1912B, 130.]

Same—Terms—Rates and Prices—When not Specifically Enforceable.

2. Where a contract leaves the matter of rates or prices uncertain, it cannot be specifically enforced unless they can be made certain by means provided in the contract itself.

On validity and effect of stipulation in contract to renew on terms to be agreed upon, see note in 32 L. R. A. (n. s.) 201.

2 LIVINGSTON WATERWORKS v. CITY OF LIVINGSTON. [Oct. T.'16

Same—Specific Performance—Municipal Waterworks Contract—Renewal Agreement.

3. *Held*, under the above rules, that a contract between a city and a water company under the terms of which the city bound itself to either purchase the company's plant at the end of twenty years, or renew the contract for twenty years longer "upon such terms as are mutually agreed upon at that time," was not specifically enforceable, inasmuch as courts cannot compel parties to agree or make an agreement for them.

Same.

4. Since the contract *supra*, sought to be specifically enforced was the contract originally in contemplation of the parties, at which time the Public Service Commission, with power to fix water rates, had not been created, the contention that, in view of such power, the clause calling for a renewal of the contract amounts to an agreement to renew at such rates as the commission may prescribe, and is therefore enforceable under paragraph 2, *supra*, *held* without merit.

Same—Specific Performance—Renewal Agreement—Estoppel.

5. Where the renewal of a twenty year water contract between a city and a water company became the subject of controversy immediately after its expiration, the company was not in position to assert estoppel because misled into making costly expenditures on the plant by the conduct of the city.

Appeal from District Court, Park County, in the Sixth Judicial District; G. W. Pierson, Judge of the Thirteenth District, presiding.

ACTION by the Livingston Waterworks against the City of Livingston and others. From a judgment for defendants and an order denying a new trial, plaintiff appeals. Affirmed.

Messrs. Gunn, Rasch & Hall, Mr. Jas. Murray, Jr., Mr. O. M. Harvey and Mr. Fred. L. Gibson, for Appellant, submitted a brief, and one in reply to that of Respondents; Mr. M. S. Gunn argued the cause orally.

The power to enter into a contract for a supply of water for a city and its inhabitants includes the power to grant a franchise, to lay and maintain pipes in the streets and operate the plant. (*Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. 249; *State v. City of Great Falls*, 19 Mont. 518, 49 Pac. 15; *Andrews v. National Foundry & Pipe Works*, 61 Fed. 782, 10 C. C. A. 60; *Pike's Peak Power Co. v. Colorado Springs*, 105 Fed. 1, 44 C. C. A. 333.)

The option granted by section 6 of the ordinance could not be exercised until after the expiration of twenty years from the date of the completion of the plant. After twenty years it became a continuing option. The city was required to either exercise the option to purchase at the expiration of twenty years or renew the contract. The renewal of the contract would not preclude the city from exercising the option to purchase, but the effect of renewing would be to continue the contract until the option is exercised, or until the expiration of the second twenty year period. (*Salina Waterworks Co. v. Salina*, 195 Fed. 142.) The city was estopped from questioning the reasonableness of the term. (3 Dillon on Municipal Corporations, 5th ed., p. 2151; *California Reduction Co. v. Sanitary Reduction Works*, 126 Fed. 29, 61 C. C. A. 91; s. c., 199 U. S. 306, 50 L. Ed. 204, 26 Sup. Ct. Rep. 100; *Atlantic City Water-Works Co. v. Atlantic City*, 48 N. J. L. 378, 6 Atl. 24.) In the case of *Slade v. City of Lexington*, 141 Ky. 214, 32 L. R. A. (n. s.) 201, 132 S. W. 404, a contract to purchase at the expiration of twenty-five years, or renew for an additional term of twenty-five years, was held valid. (See, also, *Salina Waterworks Co. v. Salina*, *supra*; *National Waterworks Co. v. Kansas City*, 62 Fed. 853, 27 L. R. A. 827, 10 C. C. A. 653; *City of Austin v. Bartholomew*, 107 Fed. 349, 46 C. C. A. 327.)

The contract to renew upon terms to be agreed upon was valid and enforceable. (*Slade v. City of Lexington*, 141 Ky. 214, 32 L. R. A. (n. s.) 201, 132 S. W. 405; *Castle Creek Water Co. v. City of Aspen*, 146 Fed. 8, 8 Ann. Cas. 660, 76 C. C. A. 516; *City of Fayetteville v. Fayetteville Water Co.*, 135 Fed. 400; *Bristol v. Bristol & Warren Waterworks Co.*, 19 R. I. 413, 32 L. R. A. 740, 34 Atl. 359; *Joy v. City of St. Louis etc. Ry. Co.*, 138 U. S. 1, 34 L. Ed. 843, 11 Sup. Ct. Rep. 243; *St. Paul, M. & M. Ry. Co. v. Western Union Tel. Co.*, 118 Fed. 497, 55 C. C. A. 263; *Union Pac. R. R. Co. v. Chicago Ry. Co.*, 163 U. S. 564, 41 L. Ed. 265, 16 Sup. Ct. Rep. 1173; *Kaufmann v. Liggett*, 209 Pa. 87, 103 Am. St. Rep. 988, 67 L. R. A. 353, 58 Atl. 129; *Arnot v. Alexander*, 44 Mo. 25, 100 Am. Dec. 252;

Tscheider v. Biddle, 5 Dill. 58, Fed. Cas. No. 14,210; *Coles v. Peck*, 96 Ind. 333, 49 Am. Rep. 161; *Gunton v. Carroll*, 101 U. S. 426, 25 L. Ed. 985; *Springer v. Borden*, 154 Ill. 668, 39 N. E. 603; *Central Trust Co. v. Wabash etc. Ry. Co.*, 29 Fed. 547.)

The law of Montana (Laws 1913, Chap. 52) has now conferred upon a commission the power and authority to prescribe the rates to be charged and to regulate and control the service by water companies. Any rates agreed upon, or prescribed by the court, are subject to revision by the Public Service Commission. If the contract had provided that in the event the city should not purchase, the contract as made should continue for another period of twenty years, the rates and prices agreed upon would be subject to control and regulation by the Public Service Commission. Such a contract is subject to the police power of the state. (*Walla Walla Case*, 172 U. S. 1, 43 L. Ed. 341, 19 Sup. Ct. Rep. 77; *Manigault v. Springs*, 199 U. S. 473, 50 L. Ed. 274, 26 Sup. Ct. Rep. 127; *Yeatman v. Towers*, 126 Md. 513, 95 Atl. 158.)

Alleged failure of water company to join with city in the appointment of appraisers or commissioners to determine value of waterworks: Until the city elected to purchase, there was no obligation on the part of the water company to name a price, or join with the city in having the price fixed in the manner provided. (*Montgomery Gas Light Co. v. City Council*, 87 Ala. 245, 4 L. R. A. 616, 6 South. 113; *Galena Water Co. v. City of Galena*, 74 Kan. 644, 87 Pac. 736; *Cherryvale Water Co. v. City of Cherryvale*, 65 Kan. 219, 69 Pac. 176.) If the price had been ascertained, any election by the city to purchase would have been nugatory. As a matter of fact, the constitutional provision limiting the indebtedness of cities, and the law enacted to make the same effective, have deprived the city of its right to exercise the option to purchase without the consent of the taxpayers. Until the taxpayers consent, the option to purchase cannot be exercised. It is within the power of the law-making body of the state to absolutely prohibit, or attach conditions to the exercise of the option by the city to purchase. (*Borough*

of *North Wildwood v. Board of Public Utilities Comm.*, 88 N. J. L. 81, 95 Atl. 749; *City and County of Denver v. New York Trust Co.*, 187 Fed. 890, 110 C. C. A. 24.)

The source of supply having been designated in the contract, and the quality of the water having been defined to be "as good and wholesome" as could be obtained from such source, there is no obligation on the part of the water company to filter the water or otherwise purify the same. (*City of Georgetown v. Georgetown Water etc. Co.*, 134 Ky. 608, 24 L. R. A. (n. s.) 303, 121 S. W. 428; *State v. Great Falls*, 19 Mont. 518, 49 Pac. 15; *Green v. Ashland Water Co.*, 101 Wis. 258, 70 Am. St. Rep. 910, 43 L. R. A. 117, 77 N. W. 722.) Furthermore, the city having accepted the water and having made no complaint regarding the same until the commencement of this litigation, is estopped now from questioning the quality of the water. (*Cherryvale Water Co. v. City of Cherryvale*, 65 Kan. 219, 69 Pac. 176; *Covington Gaslight Co. v. City of Covington* (Ky.), 58 S. W. 805.)

Mr. Edward Horsky and *Mr. Elbert F. Allen*, for Respondents, submitted a brief and argued the cause orally.

Through the company's refusal to join with the city in naming a third commissioner, it failed to comply with the contract as to the mode of ascertaining the purchase price; nor did it give the option to the city which it agreed to give. It cannot now call on a court of equity to decree specific performance. (*Town of Glenwood Springs v. Glenwood L. & W. Co.*, 202 Fed. 678, L. R. A. 1915C, 438, 121 C. C. A. 88; s. c., 231 U. S. 735, 58 L. Ed. 549, 34 Sup. Ct. Rep. 315.)

The agreement to renew upon terms to be mutually agreed upon twenty years later is invalid and unenforceable. (*Mona-han v. Allen*, 47 Mont. 75, 130 Pac. 771.) It is nothing more than simply "an agreement to enter into an agreement upon terms to be afterward settled between the parties." (*Long v. Needham*, 37 Mont. 408, 423, 96 Pac. 731.) Courts cannot perfect or enforce contracts from which essential details are omitted. (*Gates v. Gamble*, 53 Mich. 181, 18 N. W. 631; *Gas-*

light etc. Co. v. City of New Albany, 156 Ind. 406, 59 N. E. 176; *Johnson v. Plotner*, 15 S. D. 154, 87 N. W. 926; *Buck v. Pond*, 126 Wis. 382, 105 N. W. 909; *Geer v. Clark*, 82 N. Y. Supp. 87, 83 App. Div. 292; *Park v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 114 Wis. 347, 89 N. W. 532; *Morrill v. Tehama Cons. M. Co.*, 10 Nev. 125; *Weibert v. Hanan*, 136 App. Div. 388, 121 N. Y. Supp. 35; *Meyer Land Co. v. Pecor*, 18 S. D. 466, 101 N. W. 39; *Elks v. North State Ins. Co.*, 159 N. C. 619, 75 S. E. 808.)

Where by the terms of the contract the consideration is not definitely fixed, but is to be determined by arbitration or by the decision of a third person, a court of equity will not enforce specific performance until the consideration is determined. (3 Elliott on Contracts, p. 473.) Specific performance cannot be had of an executory, *ultra vires* promise of a corporation. (*Id.*, p. 476.) Alternative stipulations in a contract of the kind in question are not enforceable. (*Id.*, p. 408.) Specific performance will not be decreed where the contract is contingent upon the subsequent consent or agreement of the parties thereto. (*Glidden v. Korter*, 90 Me. 269, 38 Atl. 159.)

Counsel assert that "not a case was cited and none can be found holding that a contract between a city and a water company for a supply for municipal purposes, where the franchise of the water company is not exclusive, creates a monopoly except the *Davenport-Kleinschmidt Case*." We refer to the following cases, in full comport with the justice-breathing spirit pervading the Davenport decision: *Brenham v. Brenham Water Co.*, 67 Tex. 545, 4 S. W. 143; *Altgelt v. San Antonio*, 81 Tex. 436, 13 L. R. A. 383, 17 S. W. 75; *Hartford Fire Ins. Co. v. City of Houston*, 102 Tex. 317, 116 S. W. 36; *Ennis Waterworks v. City of Ennis* (Tex. Civ.), 136 S. W. 513; *Flynn v. Little Falls El. & W. Co.*, 74 Minn. 180, 77 N. W. 38, 78 N. W. 106; *Marin Water etc. Co. v. Sausalito*, 168 Cal. 587, 143 Pac. 767; *Long v. City of Duluth*, 49 Minn. 280, 51 N. W. 913; *Thrift v. Elizabeth City*, 122 N. C. 31, 44 L. R. A. 427, 30 S. E. 349; see note, 13 L. R. A. 383; *Gale v. Kalamazoo*, 23 Mich. 344, 9 Am.

Rep. 80; *National Surety Co. v. Kansas City etc. Co.*, 73 Kan. 196, 84 Pac. 1035; *Kirkwood v. Meramec Highlands Co.*, 94 Mo. App. 637, 644, 68 S. W. 761. The term "monopoly" includes any contract or combination which tends to create a monopoly and to deprive the public of the advantages which flow from free competition. (*Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. Ed. 136, 20 Sup. Ct. Rep. 96; *United States v. E. C. Knight Co.*, 156 U. S. 1, 39 L. Ed. 325, 15 Sup. Ct. Rep. 249; *Northern Securities Co. v. United States*, 193 U. S. 197, 332, 48 L. Ed. 679, 24 Sup. Ct. Rep. 436.)

MR. JUSTICE SANNER delivered the opinion of the court.

In August, 1889, the city of Livingston passed Ordinance No. 24, the effect of which, as amended by Ordinance No. 25 enacted within thirty days thereafter, was to grant to C. S. Stebbins, Isaac Orschel and Samuel Bundock, their successors or assigns, "the privilege of constructing and maintaining waterworks in the city of Livingston, * * * and thereby supply said city with as good and wholesome water for public and private uses as can be taken from the main Yellowstone River in the vicinity of Livingston on the following terms and conditions." The terms and conditions which follow require that the schedule rates set forth in the ordinance shall not be exceeded; that the plant to be constructed shall be adequate as completed and shall be enlarged as may be necessary; that the city shall take from the grantees and be furnished by them with all the fire hydrants it needs, not less than a certain minimum number, and with water therefor, at a specified annual rental "for the full term of twenty years"; that certain conditions touching the free use of water by the city, the use of the public streets, avenues, alleys and parks by the grantees, the character and extension of its mains and laterals, the equipment of its plant, the maintenance of a definite fire pressure, and certain other features of service, shall be observed; and it is provided that in case the grantees or their successors shall fail at any time and for a period of sixty days "to comply with any material term, condition or stipula-

tion of this ordinance," unavoidable delays and accidents excepted, the city shall have the right to terminate the contract. By section 6 of the ordinance the grantees agree to give the city the option to buy the plant at any time after the expiration of twenty years from its completion, under certain conditions; and section 7 provides: "At the expiration of twenty years from date of the completion and testing of said waterworks, if the city of Livingston does not purchase said waterworks upon above terms, it shall renew the contract with said Stebbins, Orschel and Bundock, their heirs or assigns, for twenty years longer upon such terms as are mutually agreed upon at that time, provided that such shall in no case exceed the prices fixed and stipulated by this ordinance, nor shall the renewal of such contract in any case annul the operation of this ordinance in its full force, effect and control of said Stebbins, Orschel and Bundock, their heirs or assigns, as herein provided."

The plaintiff below, pleading the passage of this ordinance and the execution of an agreement to comply with its terms, further alleges that the plaintiff is the successor of the grantees named therein; that the waterworks contemplated thereby were completed and accepted in July, 1890, since which time and by means whereof the city and its inhabitants have been supplied with pure and wholesome water in accordance with the terms of said ordinance; that, although more than twenty years have since elapsed, the city has not exercised the option to purchase and has refused to renew said contract; that in the erection and maintenance of said waterworks plant large sums of money have been expended, and since the expiration of said twenty-year period the city has required the plaintiff and its predecessors in interest to make certain improvements and extensions to said waterworks system which they have done, expending large sums of money in that behalf in reliance upon said provision requiring said city to renew said contract for a period of twenty years additional; that the plaintiff is willing to agree upon a fair, reasonable and just schedule of rates to form the basis of renewal and to enter into a contract accordingly, but the city

declines and refuses to make any effort to agree upon such schedule; that in consequence thereof plaintiff is subjected to irreparable and incalculable injury—for which reasons it is prayed that the court fix such rates itself or through reference to the Public Service Commission, and that the city, its mayor and board of aldermen, be compelled to enter into a renewal of said contract.

The defendants answered, contesting the right of the plaintiff to relief on many grounds, amounting to these: That the plaintiff has not performed said contract, that said contract was unreasonable and void in its inception, and that the provisions for renewal are not enforceable.

Upon the trial, which was to the court sitting without a jury, much evidence was presented, including testimony which tended to show that in times of fire the pressure has not been adequate nor anywhere near the contract requirements, of which fact the city repeatedly complained, and that the plaintiff was not disposed to negotiate for terms of renewal save upon the basis of the same or increased rates. The trial court found that plaintiff had failed to make a case for specific performance, and that defendants were entitled to judgment on the merits. Such judgment was entered, and from it, as well as from an order denying its motion for new trial, plaintiff has appealed.

We think it unnecessary to canvass all the questions presented in this case. Clearly, the fundamental one is the force and effect of section 7 quoted above; for, unless there is a duty to renew in virtue of the provisions of this section, the other considerations suggested as supporting the judgment are relatively unimportant.

It is to be observed that the contract, as originally made, was apparently to run only for twenty years; at the end of which time the city bound itself to either purchase the plant or to “renew the contract * * * for twenty years longer upon such terms as are mutually agreed upon at that time, provided that such shall in no case exceed the prices fixed and stipulated [1] by this ordinance.” That an agreement to enter into an

agreement upon terms to be afterward settled between the parties cannot, as a general rule, be enforced, is the settled law of this state. (Rev. Codes, sec. 6102; *Long v. Needham*, 37 Mont. 408, 423, 96 Pac. 731; *Monahan v. Allen*, 47 Mont. 75, 130 Pac. 768.)

[2, 3] The appellant, conceding this, insists that "the renewal of a contract implies that the terms shall remain unchanged"; that the true meaning of the clause is "the contract was to continue for another period of twenty years, subject to an adjustment of rates"; and therefore the present case is not within the general rule above stated, but is within a recognized exception to that rule, as shown by the cases referred to below. This seeks to avoid one difficulty by encountering another equally serious. The clear contemplation of the contract, as created by the ordinance and its acceptance, is that the grantees, their successors and assigns, should have the exclusive right to supply the municipal needs of the city; and, upon the appellant's interpretation, this right is to endure for forty years, subject only to an adjustment of rates at the end of twenty years. As no such contract was within the power of the city (*Davenport v. Kleinschmidt*, 6 Mont. 502, 528 *et seq.*, 13 Pac. 249), we cannot assume without convincing reasons that any such contract was intended.

In point of fact, the terms of the contract comprehend other things besides rates or prices. They stipulate conditions of quality, quantity, distribution, pressure; in short, the elements that go to make up "service" supposed in 1889 to be adequate to the needs of the city for twenty years, but which the experience of that time might demonstrate to be either inadequate or unnecessary. Had it been the intention to tie the hands of the parties in relation to all these matters, leaving only the matter of rates or prices for adjustment, the statement of that intention could have been made as plain as counsel now make it in their brief. It is quite true that the terms to be agreed upon "shall in no case exceed the prices fixed and stipulated by this ordinance," but this does not make terms and prices synonymous. It merely attempts by fixing a maximum to limit the scope of any agreement upon terms, so far as the terms to be agreed upon

have to do with prices. In our opinion, therefore, the words "renew the contract" do not mean an extension of the same contract for the additional period, subject only to a rate adjustment; they were used to signify that, in case the city did not purchase the plant, there should be further contractual relations between the parties for an additional period of twenty years touching the same subject matter and having in view the same general purposes, but with such differences in terms—with all the word implies—as the experience of twenty years might lead the parties to insist upon. If this interpretation be correct, the judgment was proper, because the appellant neither alleged nor attempted to prove any disposition to agree upon terms in this sense, but only upon "a fair, reasonable and just schedule of rates."

Assuming, however, that the only terms to be agreed upon were rates, it does not follow of necessity that the stipulation to renew can be specifically enforced—and this because these terms were to be such as the parties themselves should fix. Rates or prices are generally an essential feature of a contract, though the mode of ascertaining them may not be; and, when they are left uncertain, the contract cannot be enforced unless they can be made certain by means provided in or contemplated by the contract itself. The existence within the contract of a method or means, by which uncertain terms may be made certain, forms the basis of the exception invoked, as appellant's authorities abundantly show. (See *Arnot v. Alexander*, 44 Mo. 25, 100 Am. Dec. 252; *Tscheider v. Biddle*, 5 Dill. 58, Fed. Cas. No. 14,210; *Gunton v. Carroll*, 101 U. S. 426, 25 L. Ed. 985; *Coles v. Peck*, 96 Ind. 333, 49 Am. Rep. 161; *Central Trust Co. v. Wabash Ry. etc. (C. C.)*, 29 Fed. 546; *Joy v. St. Louis*, 138 U. S. 1, 34 L. Ed. 843, 11 Sup. Ct. Rep. 243; *Springer v. Borden*, 154 Ill. 668, 39 N. E. 603; *Union Pac. Ry. Co. v. Chicago, M. & St. P. Ry. Co.*, 163 U. S. 564, 41 L. Ed. 265, 16 Sup. Ct. Rep. 1173; *Kaufmann v. Liggett*, 209 Pa. 87, 103 Am. St. Rep. 988, 67 L. R. A. 353; *City of Fayetteville v. Fayetteville Water Co. (C. C.)*, 135 Fed. 400; *Bristol v. Bristol Waterworks Co.*, 19

R. I. 413, 32 L. R. A. 740, 34 Atl. 359; *Castle Creek Water Co. v. Aspen*, 146 Fed. 8, 8 Ann. Cas. 660, 76 C. C. A. 516; *Slade v. City of Lexington*, 141 Ky. 214, 32 L. R. A. (n. s.), 201, 132 S. W. 405.)

The earliest of these cases is *Arnot v. Alexander*; but the oldest precedent referred to by any of them is *Hall v. Warren*, 9 Ves. Jr. 605, decided in 1804, and this, for present purposes, may represent the genesis of the exception in question. *Hall v. Warren* was a bill for specific performance of an agreement executed by Warren, to sell an advowson and estate to Hall at such price as the advowson should be valued at by Mr. Morgan, and the other premises by persons to be nominated. The principal question was the competency of Warren to contract; but, some contention having been made that the contract was not enforceable, because of uncertainty in the price to be paid, the Master of the Rolls (Sir William Grant) said: "The contract is produced and proved. Upon the face of it nothing appears to prevent execution. * * * It fixes no value upon the estate, but it provides a mode in which the value is to be ascertained that is perfectly fair and equal between them"—and he directed that issue be made and the cause be tried upon the question of sanity.

In addition to this case, *Arnot v. Alexander* cites two pertinent decisions from Missouri, viz., *Blackmore v. Boardman*, 28 Mo. 420, decided in 1859, and *Garnhart v. Finney*, 40 Mo. 449, 93 Am. Dec. 303, decided in 1867. In each of these cases there was involved and held enforceable a covenant for the periodical renewals of a lease, which did not fix the rentals for the renewal periods, but did provide how such rentals should be fixed, to-wit, by appraisement in the lease specially provided; and *Arnot v. Alexander* is itself exactly similar, except that, instead of a formal appraisement, the rentals were to be determined by the agreement of the parties or by what "any other responsible parties will agree to give." The court, deeming that to be certain which can be made certain, said: "Leaving the amount of rent for the renewal term of the lease to be ascertained by what responsible parties would agree to pay for the use of the prem-

ises fixes the rent with as much certainty as though it were to be determined by a board of appraisers to be selected by the parties to the lease. * * * The standard of valuation would be the same in both cases, to wit, the rentable market value of the premises at the time the valuation should be made." Upon this theory, *Tscheider v. Biddle*, *Gunton v. Carroll*, *Coles v. Peck*, *Springer v. Borden* and *Kaufmann v. Liggett* were similarly decided. They also disclose stipulations to renew leases or to convey real estate at a valuation to be fixed by appraisers; and though in nearly all of these cases the appraisement was defeated either by the refusal of the defendant to act, or by circumstances beyond the control of both parties, relief was allowed because the stipulations were held to express an intention to reach a fair and reasonable value—something capable of being made certain as well by the court as by appraisement.

Analogous to these decisions, and based either upon them or upon like considerations, are several of the other cases cited—though dealing with contracts of quite different character. *Central Trust Co. v. Wabash Ry. etc.*, and *Joy v. St. Louis*, are the same—comprehending the decision on circuit and the decision on appeal. The subject matter was an agreement for a right of way across Forest Park, near St. Louis, wherein it was provided: "Said party of the second part shall permit, under such reasonable regulations and terms as may be agreed upon, other railroads to use its right of way through the Park and up to the terminus of its road in the city of St. Louis, upon such terms and for such fair and equitable compensation to be paid to it therefor as may be agreed upon by such companies." The supreme court, holding the matter of "reasonable regulations and terms" to have been settled by contemporary agreement, disposes of the unsettled question of compensation by saying: "Although the statement is that the compensation is to be such 'as may be agreed upon by such companies' yet the statement that it is to be 'fair and equitable' plainly brings in the element of its determination by a court of equity." So, too, the case of *Union Pac. Ry. Co. v. Chicago, M. & St. P. Ry. Co.*, enforcing

an agreement for the joint use of a railway bridge and tracks, lays emphasis on the fact that the conditions of such joint use were not only to be reasonable and just at all times, but were to be settled by referees in case the parties should not be able to agree.

In *Bristol v. Bristol Waterworks Co.* there was enforced a contract to install a system of waterworks and supply the town of Bristol with water for fifty years, with the proviso that the town might at its option purchase the waterworks at any time after ten and within fifteen years for a fair and reasonable price to be agreed upon by the parties or fixed by a majority of appraisers, one to be appointed by the town, one by the waterworks, and the third by the two so chosen. The waterworks were installed, and at the proper time the town signified its desire to purchase; but the company refused either to negotiate or appoint an appraiser. On a suit by the town for specific performance, it was held that, forasmuch as the stipulation was to sell at a fair price, the manner in which such price should be ascertained was not so essential that the right of the town could be defeated by the arbitrary refusal of the company to do what it ought to do. And this ruling, with the reasoning employed to justify it, was followed in *Fayetteville v. Fayetteville Water Co.*, presenting a similar stipulation, and in *Castle Creek Water Co. v. Aspen*, wherein the valuation by appraisers was to be based upon the "productive worth" of the plant. In the last-mentioned decision, Judge Sanborn collates the precedents, and from them concludes: "The stipulation for a determination of the price by appraisers in case of a sale was neither a condition nor the essence of the agreement nor of the contract of sale. It was an incident of each, a stipulation not of substance, but of mode. Moreover, the contract prescribes the standard by which the price shall be measured. It provides that it shall be based upon the productive worth of the waterworks, and not upon their cost. The stipulation for appraisers, therefore, is but a designation of the method of the selection of those who shall take the necessary accounting, and apply this measure for the determina-

tion of the price. The ascertainment of this standard of measurement is necessarily conditioned by an accounting of the income and expenses of the waterworks during a reasonable length of time anterior to the date of sale, and a calculation from this accounting and from the net income it will disclose of the productive worth of the property. The consideration and settlement of issues dependent upon the taking of accounts composed of many items is one of the great heads of equity jurisprudence, and the appointment of an accountant, the examination and confirmation of his report, are the ordinary functions of the chancellor. The stipulation for the choice of appraisers is therefore merely incidental to the contract of sale, and it provides for an act which may be well and wisely performed by a court of equity."

Thus far the development and application of the exception invoked are reasonably harmonious, since all the cases appeal to an intention expressed in the contract to resort in the last analysis to some standard or method other than the bargaining of the parties themselves. *Slade v. City of Lexington*, however, is a distinct departure. There, as here, the contract was to furnish a city with water for a term of years, with the option to the city to buy the plant at the end of the term, and declaring that, if the city did not elect to buy, the contract should be renewed for a further period "on terms as mutually agreed on at that time." The original period being about to expire, there was much conference between the city authorities and the water company, resulting in a renewal contract upon terms satisfactory to both and upon which renewal the parties were then acting. The renewal was sought to be annulled at the suit of a taxpayer, and the court, assuming that an agreement to renew upon terms to be agreed upon is a nullity, sought refuge in the exception here invoked, holding the stipulation to imply that the terms were to be "fair and equitable" and so within the cases referred to above. To our minds, this was unnecessary. An agreement to renew on terms to be agreed upon is simply not enforceable, because the court cannot compel the parties to

agree nor make an agreement for them; but the uncertain term can be made certain by agreement of the parties, and, if they choose to agree, the difficulty is surmounted and the agreement is complete. In such a case no need exists for thrusting into the contract a condition not expressed by the parties nor—in our judgment—implied by them, since they reserve to themselves the right to bargain; and the right to bargain means the right to negotiate for and settle upon terms which a court might or might not consider entirely “fair and equitable.” Any other conclusion vests with courts the power to make contracts for parties in every instance. There was not in that case, as there is not in this case, any intention expressed or implied to permit the settlement of the terms of renewal to be determined by any other agency than the parties themselves nor upon any other consideration than their free assent. Because in the *Slade Case* the parties did so agree and thus complete the contract, we may respect the final conclusion there declared; but, as an application of the exception here invoked, we must decline to follow it. In so doing, we conceive ourselves supported by the cases considered above as well as by other abundant authority. (Pomeroy on Specific Performance, secs. 148, 149, 150, 151, and citations; 36 Cyc., p. 959, sec. 7; *Id.*, p. 596, secs. “b” and “c,” with citations; 26 Am. & Eng. Ency. of Law, 37, sec. 5.)

The suggestion is made, however, that since the law now [4] confers upon the Public Service Commission of this state the power and authority to make rates to be charged and to regulate and control the service to be given by water companies, and since the terms agreed upon for renewal by the parties, if they had agreed, would be subject to the control and regulation of that commission, the clause in question “amounts simply to an agreement for a renewal of the contract upon such terms or at such prices as said commission may prescribe.” The answer is: We are here concerned with a matter of contract, and no such thing was within the contemplation of the parties when the contract was made. It is the contract which was made that is sought to be enforced; and, granting that whatever terms the

parties might have agreed upon would be subject to control by the Public Service Commission, this would not dispose of the fact that the renewal they agreed to make was one upon terms they themselves might fix.

Some stress has been laid upon the special appeal to equity [5] said to arise out of the circumstances that the construction and maintenance of the water plant have entailed great expense, and that since the expiration of the twenty-year period, the appellant and its predecessors have made costly enlargements at the behest of the city. Nothing was done within the twenty-year period that was not required by the contract to be done, and nothing that was then done can authorize the courts to command either party to now do what they cannot be compelled to do. Since that time the renewal has been the subject of negotiation or controversy, and the nearest approach to an agreement upon terms has been the appellant's expressed indisposition to consider any terms save rates, or any rates except those fixed by the ordinance or increased ones. If, therefore, the appellant and its predecessors have expended further moneys in reliance upon their view of the force and effect of the renewal clause, if they have chosen to depend upon a provision which cannot be enforced, they can hardly claim to have been misled by the conduct of the city to their prejudice. The appellant is simply left without a contract, and relegated to its rights and duties as a public utility, just as any water company is whose contract has expired. It must rest content in the fact that, possessing the only source of supply in Livingston, it may continue to furnish that city and its inhabitants with all the water needed by them, upon a fair and reasonable basis—at least until competition, lawfully established, shall compel it to share the field.

The judgment and order appealed from are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

Rehearing denied January 25, 1917.

STATE EX REL. EVANS, RELATOR, v. STEWART, GOVERNOR,
ET AL., RESPONDENTS.

(No. 3,940.)

(Submitted October 16, 1916. Decided November 13, 1916.)

[161 Pac. 309.]

Farm Loan Act—Constitution—Statutory Construction—Enabling Act—School Funds—Investment—Duty of State Land Board—Implied Powers—Counties—Loaning Credit.

Statutes—Initiative—Enactment—Legislature—Constitution.

1. Statutes enacted by the people directly under the initiative are of equal dignity with those passed by the legislative assembly and approved by the governor; in the enactment of the former the provisions of the state Constitution can no more be transgressed than in that of the latter.

[As to construction of initiative or referendum provisions in Constitution, statute or municipal charter, see note in *Ann. Cas.* 1916B, 375.]

Same—Legislative Power—Constitution.

2. The state legislature possesses plenary legislative power, except as limited by the Constitution of the United States, the treaties made and statutes enacted pursuant thereof, and by the Constitution of the state.

Farm Loan Act—Validity—Constitution—Enabling Act.

3. The Farm Loan Act (Laws 1915, p. 486), so far as it provides (secs. 1, 2, 5) a method of procedure under which the state board of land commissioners may invest common school and other specified state funds in first mortgages on good, improved farm lands in the state, and for foreclosure thereof in case of default in the payment of interest thereon, *held* proof against attack on constitutional ground, and not to conflict with the Enabling Act.

Same—State Funds—Investment—Power of Legislature.

4. Since the Constitution makes no reference to the investment of the reform school, deaf and dumb asylum and capitol building funds, the legislature could prescribe such regulations as it saw fit touching that subject.

Same.

5. Under its power referred to in paragraph 4 above, that conferred by section 12, Article XI, of the Constitution with relation to funds belonging to the higher educational institutions, which is to be exercised under such regulations "as may be prescribed by law," and that contained in section 3, of the same Article, as to the permanent public school funds to be invested "under the restrictions to be provided by law," the legislature could in the Farm Loan Act, properly exclude county, city and town bonds, as well as warrants and school district bonds not constituting the only outstanding issue, from the list of securities available for the investment of such funds.

Statutes—Power of Legislature—Constitutional Limitations.

6. The authority of the legislature, otherwise plenary, will not be held circumscribed by implication; but one who seeks to limit it must be able to point out the particular provisions of the Constitution which contains the limitation in clear terms.

Farm Loan Act—Investment of State Funds—Duty of State Board of Land Commissioners.

7. *Held*, that the state board of land commissioners must, in the investment of the funds mentioned in the Farm Loan Act, after having given preference to the public securities enumerated, employ the residue in the other securities named, including first mortgages upon good, improved farm land in the state.

Same—State Board of Land Commissioners—Implied Powers.

8. Failure of the Farm Loan Act to provide the working details of the plan *held* valid (see paragraph 3 above), is not sufficient to declare it invalid, since whatever authority is necessary in the state land board to execute the commands of the Act is, in the absence of specific direction, conferred by implication, matters of detail—such as the fixing of the rate of interest, etc.—being left to the wide discretion of the board for control by appropriate rules or regulations.

Statutes—Validity—How Determined.

9. The validity of an Act called in question is to be determined, not only by what is certain to be done, but by what may be done, under it.

Farm Loan Act—Invalid Provisions—Counties—Loaning Credit.

10. *Held*, that that portion of the Farm Loan Act which seeks to commit to the several counties exclusive authority to loan the funds mentioned therein on farm mortgage security, each county being constituted a statutory guarantor of loans made, any loss to be repaid out of its common revenues, is repugnant to constitutional provisions (Const., Art. XI, secs. 3, 12; Art. XII, sec. 11; Art. XIII, secs. 1, 5), and that since these provisions apparently formed an inducement to the legislature to provide this method of making farm loans, the plan is inoperative.

Statutory Construction—Rule.

11. In construing a statute, the court must, if possible, ascertain and carry into effect the intention of the legislature, which must be gathered from the terms of the statute when considered in the light of surrounding circumstances.

Same—Farm Loan Act—What Part Enforceable.

12. Under the rule that if, after disregarding the unconstitutional portion of an Act, the remainder is complete in itself and capable of being executed in accordance with the apparent legislative intent, it will be sustained, *held* that the Farm Loan Act, so far as declared valid (see paragraph 3 above), is complete and independent of that part of the Act rejected (see paragraph 10 above), and therefore enforceable.

Original application by the State on the relation of Chas. E. Evans, against Samuel V. Stewart, Governor, and others, as members of the State Board of Land Commissioners, and F. C. Roosevelt, County Auditor of Cascade County, Montana. Writ granted.

Messrs. W. D. Rankin, A. H. Angstman and C. F. Holt, for Relator, submitted a brief; *Mr. Rankin* argued the cause orally.

Mr. Joseph B. Poindexter, Attorney General, and *Wm. H. Poorman*, Assistant Attorney General, for Respondents, submitted a brief; *Mr. Poorman* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

At the general election in 1914 the people of this state, acting under the authority reserved to them in section 1, Article V, of the Constitution, adopted by the initiative a statute familiarly known as the Farm Loan Act (Laws 1915, p. 486). Because the state board of land commissioners (for brevity designated the board) failed and refused to perform certain duties devolved upon it by the Act in question, and failed and refused to receive or consider an application for a loan on improved farm lands within this state, made by Charles Evert Evans, this proceeding in *mandamus* was instituted. In defense of its action the board insists that the statute is: (1) Unconstitutional and void in whole or in part, and (2) in any event impossible of administration.

No distinction is to be made between a statute enacted by the [1] people directly, and one enacted by the legislative assembly with the approval of the governor. The result is the same in either case. In this instance the people performed the function of the legislature, and for convenience will be referred to as such.

We enter upon our consideration of the questions involved, with [2] the fundamental principle established that the legislature of this state possesses plenary legislative power and authority, except in so far as it is limited by the Constitution of the United States, the treaties made and statutes enacted pursuant thereof, and by the Constitution of this state. (*In re Pomeroy*, 51 Mont. 119, 151 Pac. 333.)

The Act does not transgress any provision of the Constitution [3] of the United States, and no treaty right is involved; but

it is insisted that it conflicts with the Enabling Act and with several provisions of the Constitution of this state. Section 1 provides that the permanent common school fund and the other permanent educational, charitable, and penal institution funds shall be invested by the state board of land commissioners in: (a) Certain school district bonds; (b) in bonds of this state; (c) in bonds of the United States; (d) in certain state warrants; (e) in capitol building bonds of this state; (f) in irrigation district bonds; and (g) in first mortgages on good, improved farm lands of this state. Section 2 provides that applications for farm loans shall be filled by the board as rapidly as possible and in the order in which they are received. The same section contains a proviso under the terms of which there may be a distribution of certain of these funds among the several counties and loans upon farm lands, made directly by the counties. It is to this latter portion of the statute that the principal attack is directed.

Counsel for the board assume in the first instance that the Act in question provides but a single plan for loaning these funds upon farm lands, and upon that assumption condemn the entire measure. The assumption is unwarranted. The statute in very clear terms provides two distinct plans of procedure, one of which we shall designate the "primary" and the other the "contingent" plan.

1. *The Primary Plan.* Sections 1 and 2 above impose upon the board the duty to invest the specified funds in the securities enumerated therein, including the farm mortgages. Section 5 commands the board and the attorney general to prepare necessary blank forms for applications and for mortgages; each mortgage form to "contain a provision that default in the payment of interest thereon at any time for a period of thirty days after the same shall become due, shall cause the whole principal and interest on said mortgage to become at once due and payable, and said mortgage may be foreclosed in the manner provided by law." This completes the primary plan, and the statute, in so far as it provides this plan of procedure, is proof against any attack made upon it. It does not conflict in the least with any

provision of the Enabling Act. By that Act the federal government made generous grants of public lands and other property to this state for the benefit of: (a) The common schools; (b) the state university; (c) the agricultural college; (d) the state normal school; (e) the school of mines; (f) the reform school; (g) the deaf and dumb asylum; (h) the capitol building; and (i) the penitentiary.

With respect to the lands granted for common school purposes, the Enabling Act fixes a minimum sale price and declares that the proceeds from such sales, together with five per cent of the proceeds from the sales of public lands in the state, shall constitute a permanent school fund the interest from which only shall be expended. It also provides that the lands granted may be leased under regulations prescribed by the legislature of the state, with a limitation upon the term of any such lease and upon the quantity which may be let to any individual, company or corporation. (Secs. 11 and 13.) Of the lands granted for university purposes, it declares that they shall not be sold for less than \$10 per acre, but may be leased in the same manner as provided in section 11. With reference to the grants for capitol building and penitentiary purposes, it prescribes no restrictions or regulations whatever. (Secs. 12 and 15.) The only limitation imposed with reference to the other grants enumerated above is that: "The lands granted by this section shall be held, appropriated, and disposed of exclusively for the purposes herein mentioned, in such manner as the legislatures of the respective states may severally provide." It will thus be seen that the Enabling Act does not attempt to regulate the manner in which the permanent funds derived from these grants shall be invested; and, as the Farm Loan Act deals only with the investment of those funds, no possible conflict can be discovered between the two Acts.

Section 1 of the Farm Loan Act omits from the list of [4, 5] securities available for the investment of permanent public funds county, city and town bonds and warrants and school district bonds, which do not constitute the only outstanding issue.

Whether this omission was the result of inadvertence or design is not material here; but, because of the apparent attempt at discrimination, it is insisted that the section is in conflict with the provisions of section 3, Article XI, of the Constitution. Section 2, Article XI, defines public school funds. Section 12 of the same Article deals with the permanent funds belonging to the higher educational institutions, the university, agricultural college, school of mines and normal. There is still a third group made up of the permanent funds belonging to the reform school, deaf and dumb asylum and capitol building. The Constitution makes no reference whatever to the investment of the funds belonging to this last group, and therefore the legislature was left free to prescribe such regulations as might seem fit and proper. With reference to the higher educational institution funds constituting the second group, the mandate of the Constitution is that they shall be invested under such regulations as "may be prescribed by law." (Sec. 12, Art. XI.) Clearly, then, it was within the power of the legislature to make the discrimination contained in section 1 of the Farm Loan Act, and to exclude certain securities from the list available for the investment of funds belonging to the second and third groups above.

But what, if any, authority has the legislature over the investment of the public school funds constituting the first group? Section 3, Article XI—the only constitutional provision touching the subject—goes no further than to declare that: They shall "be invested, so far as possible, in public securities within the state, including school district bonds issued for the erection of school buildings, under the restrictions to be provided by law." This concluding clause must be given meaning. The framers of our Constitution were discriminating in their choice and use of language. They apparently experienced no difficulty in choosing apt words to express the particular shade of meaning which they intended to attach to any provision; and therefore, when they employed the expression "under the restrictions to be provided by law," we must assume that they meant to

have that language construed according to its ordinary meaning. "Restriction" means: "The act of restraining or the state of being restrained; limitation; confinement within bounds; that which restricts; a restraint, reservation, reserve." (Century Dictionary.) "That which restricts; a limitation; a restraint." (Webster's Internat. Dictionary.) "Limitation or confinement within bounds." (7 Words and Phrases, 6187.) "Restrict" means: "To prevent (a person or thing) from passing a certain limit in any kind of action; limit; restrain. To attach limitations to (a proposition or conception) so that it shall not apply to all the subjects to which it would otherwise seem to apply." (Century.) "To restrain within bounds; to limit; to confine." (Webster.) "To restrain within bounds; to limit; to confine." (4 Words and Phrases, 2d Ser., 364.) Viewed in the light of these definitions expressing the common understanding of the term "restriction," we think it must be held to have been the intention of the framers of the Constitution in drafting section 3, Article XI, and of the people in adopting it, that while the legislature cannot proscribe all securities or all school district bonds, it may classify such securities and include one class and exclude another. It may require the board to invest in state bonds and warrants, and forbid it to invest in county, city or town bonds or warrants. It may include in the favored class school district bonds constituting an only outstanding issue and exclude the bonds of a school district which do not constitute the only issue of the particular district. From the fact that public securities are mentioned specifically, it was doubtless intended that, when the legislature had prescribed the restrictions contemplated in section 3, such public securities thus hedged about shall be given preference in the employment of the public school funds, but further than this the section does not go.

We cannot subscribe to the doctrine that the legislature may provide restrictions for the investment of only such portion of the public school funds as may be invested in public securities, and that the remaining portion must lie idle, or, at best, be deposited under the provisions of section 14, Article XII. The

language of section 3, Article XI, if standing alone, does not require such construction, and when read in connection with other provisions of the Constitution, particularly the terms of section 12 of the same Article, the purpose to confide to the lawmakers a wide discretion in the investment of all permanent [6] school funds is apparent. The authority of the legislature, otherwise plenary, will not be held to be circumscribed by mere implication. He who seeks to limit the power of the lawmakers must be able to point out the particular provision of the Constitution which contains the limitation expressed in no uncertain terms.

Our conclusion upon this branch of the case is that the board, [7] after having given preference to the public securities enumerated, in the investment of the *public school funds*, is charged with the duty to employ the residue of those funds and all the permanent funds belonging to the higher educational institutions and to the reform school, deaf and dumb asylum, and capitol building in the other securities named, including first mortgages upon good, improved farm land in this state. This construction harmonizes section 1 of the Act with section 3, Article XI, of the Constitution, and leaves intact a complete, workable statute, absolved from any of the objections lodged against this plan.

It is no argument against the Act that it fails to provide for [8] all the working details of this primary plan. It is an elementary rule of law that: "The grant of a specific power or the imposition of a definite duty confers, by implication, authority to do whatever is necessary to execute the power or perform the duty." (36 Cyc. 1113.) By sections 1 and 2 of the Farm Loan Act the specific power is conferred, and the specific duty is enjoined upon the board to invest the public funds designated therein, in the securities enumerated, including farm mortgages, and whatever authority is necessary to execute that power and perform that duty is conferred by implication, and matters of detail are left to the board for control by appropriate rules or regulations.

While the statute declares that loans made by the several counties shall bear interest at six per cent per annum, no such restriction is laid upon the board. Under the law in force at the time the Farm Loan Act was adopted, there was conferred upon the board a very wide discretion in investing these public funds. The details of such investments were not covered by specific legislation, and yet it is a part of the history of the state that the board experienced no difficulty in making investments in public securities offered by the state, by the several counties and by municipalities in the state. The same wide latitude in matters of procedure is retained by the board under this Act. It seeks to classify public securities and to designate such of them as may be employed hereafter for the investment of these funds to utilize the funds to a much greater extent than heretofore, and to place the agricultural class in a more advantageous position toward the money market by including farm mortgages as available securities for loans. Under the former statutes the board could invest in one class of public securities bearing five per cent interest, and in another bearing four per cent or less. It could accept one issue and decline another. It could go into the market and bid as a private individual upon offered public securities of the classes mentioned, or it could waive its right to bid. So likewise it may now exact six per cent for loans made upon farm mortgages, or it may accept a lower rate if in the exercise of a wise discretion it deems it for the best interest of the state to do so; for the purpose of the law as declared in the title and body of the Act is to secure the continuous, safe investment of these public funds, and to the wisdom and integrity of the board are confided all matters of detail essential to the execution of the trust in conformity with the spirit of the Act.

2. *The Contingent Plan.* That it was not the intention of the [10] Farm Loan Act to deprive the board of all control over these funds and to commit to the several counties exclusive authority to loan on farm mortgage security in the first instance is made as certain as plain, terse English can ever be made to

express an idea. Primarily the investment of the funds in farm mortgages is intrusted to the board by sections 1 and 2 of the Act, and the board is commanded to make the loans in the order in which the applications are received by it. It was doubtless realized, however, that the contingency might arise in which the board would find itself unable to employ all of these funds available for investment in public securities and farm mortgages, and for the purpose of supplementing the primary plan, and, by bringing the borrower and lender into closer contact, encourage the utmost use of these funds by qualified land owners who might seek long-time loans at an attractive rate of interest, this proviso was added to section 2: "Provided, however, that if enough of such moneys remain on hand in the state treasury uncalled for, to warrant them doing so, the state board of land commissioners shall divide such moneys among the organized counties of the state, in proportion to the population, as nearly as may be, subject to the following provisions." Then follow the provisions for loaning such residue by the several counties in the event that the contingency arises and the residue on hand is sufficient to warrant the board in making a division of it. There may never be any funds for distribution. The board may be able to keep all of the funds securely and continuously invested in public securities and farm mortgages. The contingency provided for in section 2 may never arise, and yet it may [9] arise at any time, and the validity of the Act in so far as it provides for this contingent plan is to be tested, not by what is certain to be done under it, but by what may be done under it. (*State ex rel. Holliday v. O'Leary*, 43 Mont. 157, 115 Pac. 204.)

Whenever the contingency contemplated actually arises, the apportionment and distribution of such residue is to be made among the several counties according to population as nearly as may be done. Applications for loans are to be made to the county auditor (or, if there be no auditor, to the county clerk); the county attorney then examines the abstracts of title; the county commissioners appraise the lands offered as security, and loans may be made directly by the county, but the mort-

gages securing them must run to the state. No loan can be made upon land appraised at less than \$10 per acre, no loan may exceed two-fifths of the appraised value of the security offered, and not more than \$5,000 shall be loaned to any one individual, association or corporation.

Section 8 provides that, if any county receiving its distributive share of these funds is unable to loan them after giving the required notice, it shall return such funds to the board, with interest thereon for sixty days.

Section 9 provides that, if a borrower fails to meet the requirements of his obligation, the county attorney shall foreclose the mortgage. The same section then proceeds: "If no other person shall bid the full amount due upon said mortgage upon the foreclosure sale of the same, with the cost and expenses of the foreclosure and sale, the county attorney or county auditor shall bid in the land in the name of the county for the amount due and all costs and expenses incurred, and such county shall at once pay to the state board of land commissioners such full amount due and interest out of the general fund of the county, and if the same is not redeemed, as provided by law, the sheriff's deed shall be made to the county and the county shall thereby become the owner of said land."

By section 12 each county is made responsible and accountable for the principal and interest of all moneys received by it, and in case of loss such county shall, out of its common revenues, repay the same to the board.

Notwithstanding such funds are distributed to the several counties, and the board releases all control over them, and the counties are charged with the duty to loan or return them with interest, the state nevertheless retains title to such funds. They belong to the state in the sense that they are realized out of the grants to the state by the federal government. (*County of Des Moines v. Harker*, 34 Iowa, 84.)

By sections 8, 9 and 12 of the Farm Loan Act every county is made primarily liable for the funds received by it. It is required by section 8 to return the funds if no loans are made, in

which event it must pay interest for sixty days out of its revenues raised by general taxation, though it receives no benefit from the transaction whatever. By section 9 it is constituted a statutory guarantor of every loan made by it. If the borrower fails to pay principal or interest, the county is ultimately liable for the loss or deficiency, notwithstanding the Constitution in section 1, Article XIII, provides: "Neither the state, nor any county, city, town, municipality, nor other subdivision of the state shall ever give or loan its credit in aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association or corporation, or become a subscriber to, or a shareholder in, any company or corporation, * * * except as to such ownership as may accrue to the state by operation or provision of law."

The primary liability for the integrity of the funds distributed is sought to be fastened upon the counties by this Act, while the Constitution imposes such liability upon the state. (Sections 3 and 12, Article XI.) By the terms of this Act a county is compelled to pay out of its general revenues raised by taxation all the expense of operating under this plan, including interest on funds not loaned, and the principal and interest of loans foreclosed [in the absence of another purchaser at the foreclosure sale], excepting only the cost of abstract and recording fee; and if the funds to make these payments are not on hand in the county treasury, the county must perforce issue its warrant or evidence of indebtedness, and all this without reference to its outstanding obligations. Section 5, Article XIII, of the Constitution limits the indebtedness which a county may incur for any purposes whatever to an amount not exceeding five per cent of the value of its taxable property; but the Act in question makes no distinction between the county which has reached the limit of indebtedness and the one which has not. It attempts to impose this additional burden upon all alike, doubtless to avoid the charge that the measure is obnoxious class legislation. The borrower who secures his loan from

the county becomes indebted to the state, not to the county. His obligation runs to the state and his mortgage is made to the state; but by this Act the county is compelled to raise by taxation money to extinguish the private debt of a delinquent borrower to the state, notwithstanding the Constitution forbids it to do so.

Whatever may be said of other provisions constituting this plan—for instance, of the provision of section 2 requiring the funds to be distributed to the several counties according to population, without any means available to the board for ascertaining the population, or of the provision of section 3 requiring the board to relinquish control of these funds without any additional security from the county treasurer who receives the funds for the county, or of the provision of section 2, subdivision (c), requiring the county auditor to give public notice of the funds on hand available for farm loans, and the apparently contradictory provision of section 6, which requires such notice to be given by the county commissioners, or of the provision of section 10, which requires the county in its own name to give a release and satisfaction for a *debt due to the state* and paid by the borrower, or of the provision of section 6 (a), which attempts to impose upon a judicial officer purely ministerial duties—this much is certain: Sections 9 and 12 violate the plain mandates of the Constitution.

It is beyond the power of legislation to compel a county, or the several counties, to assume a burden imposed upon the state itself by terms of the Constitution which are mandatory and prohibitory.

A county cannot be compelled to loan its credit in aid of an individual or to make good the loss incurred by a delinquent borrower's failure to discharge his obligation to the state.

The county which has already reached the constitutional limit of indebtedness cannot be burdened by further liabilities of this character imposed by statute, or at all, without an amendment to the Constitution itself.

Taxes imposed and collected by a county can be expended only for public purposes. (Const., sec. 11, Art. XII.) They cannot be diverted to liquidate the debt of a private individual.

Whether the invalid provisions of sections 9 and 12 shall operate to defeat the contingent plan depends upon the answer to the inquiry: Are those provisions so intimately related to the remaining portions of the statute creating the plan that it may be said fairly they were an inducement to the lawmaker to provide the plan?

In construing a statute the court must, if possible, ascertain [11] and carry into effect the intention of the legislature enacting it (*Power v. Board of Co. Comanrs.*, 7 Mont. 82, 14 Pac. 658); and such intention is to be gathered from the terms of the statute, when considered in the light of surrounding circumstances. (*Jay v. School District No. 1*, 24 Mont. 219, 61 Pac. 250.) In so far as we are able to ascertain the intention of the lawmakers in providing for this contingent plan, it would seem reasonably certain that the provisions requiring the county to be responsible and accountable for the funds received by it and to guarantee each loan made by it were intended to constitute the mainstay or principal support of the entire plan. So long as the funds are committed to the custody of the board for investment, the state guarantees their integrity under the provisions of the Enabling Act and the Constitution requiring it to do so; but when by the terms of this plan the board is required to relinquish entire control and the county, through its officers, assumes exclusive management, the guaranty of the funds by the county was apparently deemed necessary to their safety and security and without which the plan would never have been devised. Under this view, the entire plan must be deemed abortive, and the statute, in so far as it provides for it, unconstitutional and void.

The people of this state, acting as a legislative body, can no more transgress the provisions of the state Constitution than can their representatives in the legislative assembly. The terms

of the Constitution can be changed or modified only in the manner indicated in Article XIX of the Constitution.

But it does not follow that because this contingent plan must [12] be disregarded the entire Act is invalidated. The respective portions of the Act providing the two plans are entirely distinct; that is to say, the provisions constituting the primary plan are in no wise dependent for their vitality upon the remainder of the Act. The primary plan is complete in itself, and will not be affected by a disregard of the remaining portions of the Act. The rule applicable here was stated by this court in *Dunn v. City of Great Falls*, 13 Mont. 58, 31 Pac. 1017, as follows: "If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained." (*Hill v. Rae*, 52 Mont. 378, 158 Pac. 826.)

Under the views herein expressed, the county auditor of Cascade county is not a necessary or proper party to this proceeding, and he is dismissed from further consideration.

The peremptory writ will issue directed to the remaining defendants constituting the state board of land commissioners, commanding them to receive and consider the application of this relator, and to take such further steps as will render effective the primary plan of the Farm Loan Act as indicated herein.

MR. JUSTICE SANNER concurs.

MR. CHIEF JUSTICE BRANTLY: While I did not hear the argument in this case, I have examined carefully the provisions of the statute and the sections of the Constitution by which its validity must be determined. I am satisfied that MR. JUSTICE HOLLOWAY has stated the only conclusion permissible, and therefore concur therein.

IN RE DOLENTY'S ESTATE.

(No. 3,757.)

(Submitted June 23, 1916. Decided November 17, 1916.)

[161 Pac. 524.]

Estates—Policy of Law—Executors and Administrators—Duties and Powers—Liability—Removal—Probate Proceedings—Title to Realty—Jurisdiction—Right to Name Successor.

Estates—Prompt Administration—Policy of Law.

1. It is the policy of the law that estates be administered with dispatch, to the end that they shall not be wasted by needless expense incident to delay and the continuation of allowances, to the injury of creditors and those entitled to have distribution made to them.

Same—Executors and Administrators—Unauthorized Disposition of Property.

2. Where the district court had granted an executrix authority to sell personal property of the estate for cash, she was without power to turn over a portion of it to one for services alleged to have been rendered in keeping her accounts, and was properly chargeable with such property as part of the assets of the estate.

Same—Property—Duties of Executors and Administrators.

3. Under section 7628, Revised Codes, an executor or administrator is chargeable not only with the assets of the estate which actually came into his hands, but also with those—including rents and profits of real estate which in the exercise of ordinary care and diligence ought to have been received from it—which by reason of his neglect he has failed to get into his hands.

[As to care and skill required of executors and administrators, see note in 12 Am. St. Rep. 311.]

Same—Property—Liability for Loss—Burden of Proof.

4. The burden of showing that an estate has apparently suffered loss through the neglect of an executor or administrator is upon the heir or creditor who seeks to charge him with the loss.

Same—Reports of Condition—Duty of Executors and Administrators.

5. An executor or administrator, when called upon by the district court, on the petition of creditors, to make report of the condition of the estate in his hands, must make full disclosure to enable the court to determine whether diligence was exercised in collecting its assets, its value, whether insolvent or not, etc.

Same—District Courts—Jurisdiction—Title to Realty.

6. The district court while sitting in probate has no authority to determine questions of title between an estate and persons claiming adversely to it.

On the right of one first entitled to administration to nominate a third person to exclusion of those next entitled thereto, see note in 22 L. R. A. (N. S.) 1161.

Same—Executors and Administrators—Removal, When.

7. Since an estate is an entirety and there can be but a single administration of it, a special administrator may not, during the incumbency of the executrix, be appointed to litigate the question of title to real property claimed by creditors to be part of the estate and by her in her own right; under such circumstances she should be removed, inasmuch as she cannot bring action against herself, and someone appointed in her place to try the question of title. (See, also, Opinion on Motion for Rehearing.)

Same—Void Sale of Property—Effect.

8. Where sales of real property belonging to an estate had been declared void, the property remained property of the estate, so that, upon the rendition of an account, the executrix should not have been permitted to charge herself with the proceeds thereof, but was chargeable with the realty itself.

Same—Executors and Administrators—Removal—Determination of Title.

9. Merely because it is the policy of the law that the surviving husband or wife shall administer the estate of the decedent spouse is no reason why he or she should not be removed, even though the sole beneficiary, where, because of the threatened insolvency of the estate, the rights of its creditors are imperiled by the neglect or inattention of the one in charge of it.

Same—Executors and Administrators—Removal—Right to Nominate Successor.

10. Though a surviving spouse has the right to nominate someone to serve in his or her stead in the administration of the decedent's estate, no such right exists, upon removal for misconduct or for the purpose of permitting trial of an assertion of rights adverse to the estate, since the successor so named would more than likely be biased in favor of the adverse claim.

Appeal from District Court, Broadwater County, in the Fourteenth Judicial District; Geo. W. Pierson, a Judge of the Thirteenth District, presiding.

IN THE MATTER of the estate of W. B. Dolenty, deceased. Petition by Con Mannix and others asking that Isabel Dolenty, executrix, be required to present an account and make report. From an order of the district court overruling objections and approving the account filed by the executrix, petitioners appeal. Reversed and remanded.

Messrs. Walsh, Nolan & Scallon, for Appellants, submitted a brief; Mr. C. B. Nolan argued the cause orally.

Mr. H. G. McIntire, for Respondent, submitted a brief and argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This is an appeal from an order made by the district court of Broadwater county, Honorable Geo. W. Pierson presiding, approving the fourth annual account of Isabel Dolenty, the surviving widow of W. B. Dolenty, deceased, and executrix of his will. Dolenty died on September 15, 1910. His estate consisted of lands and a large amount of personal property. Under the terms of the will the widow is entitled to take substantially the entire estate, subject to the payment of decedent's debts. She qualified as executrix on November 26, 1910, and has since been acting as such. On February 16, 1915, the executrix being in default in presenting her annual account, several of the creditors of the estate, having established claims aggregating about \$20,000, presented to the court their petition asking that she be required to present an account and report under oath, disclosing the amount of money received and expended, the amount of claims presented and allowed, with the names of the claimants, and all other matters necessary to show in detail the condition of the estate. The petition charged, in substance, that the executrix had been guilty of mismanagement of her trust in several particulars; that she had failed to account for some of its assets; that she had been guilty of waste; that in certain instances she had turned over property to some of the creditors in discharge of claims due to them, to the detriment of the petitioners and other creditors, the estate being insolvent; and that, except as to such claims, none of the debts due the creditors had been paid. On February 19, 1915, the court made an order directing the executrix to file on or before March 15 a full and complete report and account of all her acts and transactions since the filing of her last account, and to make full disclosure of the condition of the estate. The account having been filed in response to the order, the petitioners interposed objections to the approval thereof. Some of these question the right of the executrix to be credited with certain items paid by her as expenses of admin-

istration. Most of them challenge the conduct of the executrix as a whole, specifying particular instances of neglect and mismanagement resulting in loss of assets, or a misapplication of them to her own use, or for the benefit of certain creditors. After a hearing had on June 4, 1915, the court overruled the objections and approved the account. From this order, the petitioners have appealed.

Before taking up the various contentions made by counsel, we remark generally that the administration of this estate has not been conducted with that degree of dispatch and attention to the rights of the petitioners which the law contemplates. The respondent has been somewhat hampered and delayed by litigation, but, so far as this record discloses, it has not been so extensive nor of such a character as to cause a delay of nearly five years, leaving the creditors of the estate without satisfaction of their claims. In all cases a reasonable time—the extent of it depending upon the particular circumstances—is necessary to enable the person charged with the duty of winding up the affairs of an estate to collect the assets and to get them into condition for distribution or convert them into cash in order to realize funds necessary to meet the demands of creditors. It [1] is the policy of the law, however, that the proceedings be conducted with dispatch, to the end that the estate shall not be wasted by needless expense incident to delay and the continuation of allowances made to the widow. Creditors, if any, are entitled to prompt satisfaction of their claims, and those entitled to the residue to have distribution made of them. (*In re Tuohy's Estate*, 33 Mont. 230, 83 Pac. 486; *State ex rel. Mannix v. District Court*, 51 Mont. 310, 152 Pac. 753.)

After an examination of the record, we think that the order of the district court should be set aside, and that the respondent should be required to account for property disposed of without authority of law, for assets in the way of rents and profits of real estate in her possession which have apparently been lost through her neglect or want of attention, and to furnish information in detail as to the condition of the estate. We think,

too, that she should be expedited in bringing the affairs of the estate to a close, or, as the only alternative, that some suitable person be substituted in her place who has capacity and disposition to do so.

1. Upon the death of the decedent the estate was ostensibly solvent. As we shall presently see, owing to the loss of the rents and profits of the real estate for which the respondent has failed to account, the accumulations of interest upon established claims, and the expenses already incurred and hereafter necessary, it is now questionable whether, after other allowances which the respondent will in any event be entitled to as the surviving widow, the assets will be sufficient to satisfy the claims of the creditors.

By her inventory returned on February 18, 1911, there appears to have come into the hands of the respondent, with the other property, forty-five head of mixed cattle and seven work horses, valued at \$1,225. In her third annual exhibit dated July 17, 1913, she accounted for forty-six head of cattle of an estimated value of \$1,500, and four head of horses valued at \$250. On October 14, 1913, she made application to the court for an order authorizing her to sell at public auction or at private sale, for cash, all the property belonging to the estate. This application recited that the above-mentioned property was still in her hands. By subsequent orders from time to time the original order was amended by extending the time within which the [2] sale might be made until November 2, 1914. Under this order sales of real estate were made which will be noticed later, but of no other property. In her report she makes account of her disposition of the cattle as follows: "One Gene McCarthy was a creditor of the estate in excess of the value of the cattle mentioned in the inventory filed herein, and she, the executrix, turned over to him the said cattle in satisfaction of said claim with the approval of the court." In her testimony at the hearing she stated that McCarthy was her nephew and in her employment, and that she had sold to him both the cattle and the horses for the purpose of discharging his claim for services rendered

in keeping her accounts. There is nothing in the record showing that McCarthy had a claim against the deceased at the time of his death, nor any substantial showing that he had rendered services to the respondent of any value. Nor is it disclosed that the court had granted the respondent authority to make disposition of the property otherwise than by sale for cash under the order of sale. When this became apparent from the testimony of the respondent herself under the questioning of counsel for the creditors, she undertook to justify her course, so far as the cattle were concerned, by claiming that they had never been the property of the estate, but had belonged to herself, and this, too, in face of the fact that she had repeatedly in her inventory, her several accounts, and in her application for the order of sale charged herself with them as property of the estate. She did not undertake to explain or justify her disposition of the horses otherwise than as heretofore stated. Upon this showing these items should have been disapproved, and the respondent charged with the property as part of the assets of the estate, on the ground that her disposition of it had been made without authority. Even though the services had been rendered, it was nevertheless the duty of respondent to submit the liability incurred for them to the court for allowance and pay it in the manner directed by the court, *viz.*, by the sale of property for cash.

2. The evidence discloses that the respondent had been in possession of the following real estate which had belonged to her husband: The Ward ranch, consisting of 240 acres, valued at \$6,000; the Lansing ranch, consisting of 1,100 acres, valued at \$11,000; the Little home ranch, consisting of 320 acres, valued at \$8,000; the Little River ranch, consisting of 400 acres, valued at \$14,000; the Reed ranch, consisting of 852 acres, valued at \$43,000; and the Morse ranch, consisting of 680 acres, valued at \$9,600. Objection was made to the approval of the account on the ground that the respondent had failed to charge herself with revenues derived or properly derivable from this property, specifically the Reed and Lansing ranches.

An executor or administrator must take into his possession [3] all the estate of his decedent, real and personal, and collect all debts due to the estate. (Rev. Codes, sec. 7603.) He is "chargeable in his account with the whole of the estate of the decedent which may come into his possession, at the value of the appraisement contained in the inventory, except as provided in the following sections, and with all the interest, profit and income of the estate." (Sec. 7628.) The following sections in the Chapter (secs. 7629-7633) relieve him from liability for losses to the estate occurring without his fault, and prescribe the measure of his expenses and the compensation which he may have for his services. Under the rule declared in section 7628, the executor or administrator is chargeable, not only with the assets which actually come into his hands, but also with those which by reason of his negligence he has failed to get into his hands. (*Wheeler v. Bolton*, 92 Cal. 159, 28 Pac. 558; *Estate of Kennedy*, 120 Cal. 458, 52 Pac. 820.) Since under section 7603 he is entitled to the possession of the real estate of his decedent for the purposes of administration, the same rule must apply with reference to the rents and profits which in the exercise of ordinary care and diligence ought to be received from it. So if he has occupied it himself, or by his negligence has failed to secure from it such reasonable amount of revenues in the way of rents and profits as it ought to yield, he must be charged with their loss. (*In re Alfstad's Estate*, 27 Wash. 175, 67 Pac. 593.) [4] The burden, however, is upon the heir or creditor seeking to charge him with loss due to negligence, because, though the estate has apparently suffered loss, there is no presumption that he has been guilty of the fault causing the loss. (*Wheeler v. Bolton*, *supra*.)

Applying these rules to the facts in the case in hand, is the respondent executrix properly chargeable with the rents of the Reed and Lansing ranches? At the time of the death of decedent the Reed ranch was in possession of one Reed under some sort of an agreement the nature of which does not appear. In any event the respondent did not gain possession of it until the

early part of September, 1913. The value of the crops on it at that time, harvested in part and turned over to her, was \$6,000. It does not appear what became of these crops, except that the respondent charged herself in her account with \$275, the value of hay and grain sold by her. This she claimed she had paid to a bank in Boulder, in Jefferson county, without, however, giving any explanation why this disposition had been made of it or exhibiting a voucher showing that it had in fact been paid. In her petition for the order of sale she stated that the crops were worth \$2,000. Reed testified that the reasonable rental value of the ranch was \$1,500 per annum. The witness Rorvig testified that he offered the respondent \$1,100 rental for about 300 acres of this ranch for the year 1914, but that she refused it. The foregoing evidence is not disputed. There is also undisputed evidence that from the time the executrix took possession up to the time the account was filed this ranch had been in possession of Gene McCarthy, and had been used by him for the pasturage of sheep. With reference to the ownership of the sheep, the evidence leaves it in doubt whether they belonged to McCarthy or to him and the respondent jointly. Be this as it may, a *prima facie* case is made which, in the absence of explanation, is sufficient to justify a charge against the respondent for the crops for the year 1913 and for the reasonable rental value of the ranch thereafter; and this whether the sheep belonged to her and McCarthy or to him exclusively.

The Lansing ranch had been in substantially the same condition. It passed into the hands of the respondent at the date of her appointment. At that time the fences were in good repair, and the land had a rental value of \$300 or \$400 per annum. During the year 1914 it was being used by McCarthy in connection with the Reed ranch, for the pasturage of the sheep referred to above.

Throughout the hearing the respondent exhibited an indisposition to make any disclosures touching the condition or use made of these or any of the lands belonging to the estate, and made no other than such as were forced from her under the pressure

of cross-examination by counsel. As to the Reed and Lansing lands, it is clear that respondent has been using them as her own and appropriating the rents and profits derived from them to her own benefit. As to the other lands, there is little tangible evidence showing what use, if any, has been made of them. The record shows that little, if any, revenues have been derived from them—a condition of affairs hardly conceivable when we consider their extent and value. The court should have required a full accounting in this behalf and charged the respondent accordingly.

3. At his death the decedent had become indebted to the American National Bank at Helena to an amount approximately \$30,000, and had deposited with it, as collateral, securities valued in respondent's inventory at \$34,777.94. The evidence discloses that these securities consisted of promissory notes made by various persons to the decedent, and a contract for the sale by the decedent of certain mining property to one Gruell, which called for a payment by the latter of \$20,000. The bank did not present a claim against the estate. The indebtedness due it had at the time respondent filed her account been discharged by payments made by the makers of some of the notes and to the amount of about \$10,000, and a payment by Gruell of the amount due on the contract. The unpaid notes were thereupon delivered to the respondent. No mention of the contract had been made in the inventory. In her testimony at the hearing respondent for the first time disclosed that the bank held this security. Her report contains this statement: "The debt to the said bank has been fully paid and the said collaterals returned to the executrix, who holds them as assets of the estate." This is all the [5] information furnished. Objection was made to the approval of the account by counsel, on the ground that it did not comply with the requirements of the order which directed a full disclosure of the condition of the estate, specifically with reference to the securities mentioned in the inventory. With this contention we agree. In order that the court might determine whether the respondent had exercised diligence in collecting these

notes, whether they are of value, and therefore whether the estate is insolvent and should be administered as such by stopping the respondent's allowance theretofore made and still continued, it was important that a full disclosure should be made as to the condition of the securities and whether they are substantial assets to which the creditors could look for the satisfaction of their claims. If these securities are worth their face value and the respondent is found properly chargeable with a substantial sum in the way of rents and profits, the estate is apparently solvent; otherwise it is not. Such information as was given by the respondent was too indefinite to furnish the basis for any intelligent conclusion as to the real condition of the estate.

4. Though, as we have already said, the estate was at the outset apparently solvent and amply sufficient to satisfy the claims of the creditors, upon the disclosures made by the report and the testimony of the executrix, no definite conclusion can be reached as to what the actual condition is in this regard. Upon this condition of the record we do not think we ought, on this appeal, to venture to determine it. Except so far as the fact of insolvency will control the district court in continuing respondent's extra allowance which she claims in her account, and in permitting her to retain control of the administration, the inquiry is immaterial. Since the order must be reversed in any event, we refer the inquiry on this subject to the district court upon a full disclosure by the respondent.

5. In the inventory certain farm implements which came into the hands of the respondent were valued at \$135. These assets, and also the horses heretofore referred to, are stated by the respondent in her report and in her testimony to be of no value. From the testimony of the witness Davidson it appears without dispute that the farm implements had been used by the respondent in cultivating a part of the lands belonging to the estate. Since they were admittedly assets of the estate and were included in the inventory, she ought to have been charged with their value. (Rev. Codes, sec. 7628.) The disposition made of the horses has

been shown in the former part of this opinion. The respondent is upon her own testimony chargeable with their value.

6. It appears that at the time of his death the deceased was the owner, upon the record of deeds in Broadwater county, of 560 acres of land in addition to that mentioned in the inventory, known as the Runnimeade ranch. This was returned in the inventory at the value of \$5,000, with a notation that it was claimed by the respondent as her own. With reference to this the report states: "That W. B. Dolenty during his lifetime was the owner of the so-called Runnimeade ranch, consisting of 560 acres, appraised at \$5,000. The said W. B. Dolenty was indebted to his wife, the executrix, in the sum of \$5,000, evidenced by his promissory note. That in consideration of said indebtedness W. B. Dolenty executed and delivered some time in June, 1904, a deed to said property to Isabel Dolenty, his wife, which deed was never recorded and is lost. Isabel Dolenty has been in the open, notorious possession of said property for over ten years last past," etc. In his order approving the report, the district judge properly refused to charge the respondent with this as an asset of the estate, and thus to determine the ownership of the title.

[6] A district court sitting in probate has only the special and limited powers conferred by statute, and has no power to hear and determine any matters other than those which come within the purview of the statute or which are implied as necessary to a complete exercise of those expressly conferred. (*State ex rel. Bartlett v. Second Judicial District Court*, 18 Mont. 481, 46 Pac. 259; *In re Davis' Estate*, 27 Mont. 490, 71 Pac. 757; *In re Tuohy's Estate*, *supra*.) Among the powers conferred by the part of the Codes relating to probate proceedings (Part III, Title XII, Chapter I), we do not find any provision authorizing the court, in connection with the settlement of estates, to determine questions of title between the estate and persons claiming adversely to it. These questions must be determined in proper proceedings instituted for that purpose. (*State ex rel. Barker v. District Court*, 26 Mont. 369, 68 Pac. 856; *In re Tuohy's Estate*, *supra*.)

The respondent by her claim put herself into a position in [7] which she cannot represent the estate, and thus the creditors, and at the same time assert title in herself adversely to the estate. It is suggested by counsel that this situation might be removed by the appointment of a special administrator to litigate the question of title with the respondent. This, however, cannot be done, because the estate is an entirety, and there can be but a single administration of its affairs. (*Murphy v. Nett*, 51 Mont. 82, L. R. A. 1915E, 797, 149 Pac. 713.) Moreover, the powers of a special administrator are limited to the preservation and protection of the estate temporarily, until a general administrator or an executor has been appointed. (Rev. Codes, sec. 7474.) Conceding, therefore, that one may be appointed upon removal of an executor, until a general administrator can be appointed in his stead, this cannot be done until the executor has been removed. The only remedy for the situation thus brought about is to remove the respondent and substitute a successor for her who may bring such action as may be necessary to determine the title. Since the respondent, however, is the sole beneficiary under the will, this would be wholly unnecessary, unless it should appear that the estate has become insolvent, in which event only could the creditors have any interest in it.

7. Certain sales of real estate were made in 1914, ostensibly [8] under the order of October 14, 1913, to E. A. Kimpton and Laura T. Galen. The facts in relation to them are recited in *State ex rel. Mannix v. District Court*, 51 Mont. 310, 152 Pac. 753. It was there held that they were void for the reasons stated. The property which was the subject of them is therefore still the property of the estate, and the respondent is chargeable with it. In its approval of the account the district court treated these sales as valid, allowing the respondent to charge herself with the proceeds only. This was error.

8. Finally, it is urged that it was the manifest duty of the court to revoke the letters of respondent and appoint someone else in her stead, for the reasons that it was disclosed: (1) That more than five years had elapsed since her appointment, with no

apparent intention on her part to close the estate; (2) that because of her delay in bringing its affairs to a close the estate had become insolvent; (3) that she had been guilty of squandering and misapplying the assets; (4) that she had disposed of property belonging to the estate without lawful authority; and (5) that she had failed to account for property coming into her hands, as well as the rents and profits derivable from it, with studied effort to use it for her own benefit. *Prima facie* these charges are sustained by the foregoing recitals. There is apparent no justification for the delay in closing the estate and the disregard of the rights of the creditors. The respondent seems to have been proceeding upon the assumption that, inasmuch as she is the sole beneficiary under the will, she is entitled to use and enjoy the estate as her own and to discharge the claims of the creditors whenever it may suit her convenience.

The order is reversed and the proceeding is remanded to the district court, with directions to require the respondent to make a full and complete accounting, giving in detail the present condition and value of all of the assets of the estate; to charge her with such as she has disposed of without authority or order of court, as well as such as she has failed to receive by her want of diligence, including the reasonable value of the use of all the lands in her possession; to ascertain whether by reason of her delay and inattention, or for any other reason, the estate has become insolvent, and, if so, to remove her and appoint someone in her stead who can have the title to the Runnimeade ranch determined; and, in any event, to compel the speedy closing up of the affairs of the estate by the sale of its property and the payment of the claims of the creditors.

Reversed and remanded.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

ON MOTION FOR REHEARING.

The directions addressed to the district court in the opinion hereto delivered in disposing of the appeal herein contain

[9] the following: "To ascertain whether by reason of her [the executrix's] delay and inattention, or for any other reason, the estate has become insolvent, and, if so, to remove her and appoint someone in her stead who can have the title to the Runnimeade ranch determined." In his petition for rehearing counsel for the executrix insists that in making this direction the court overlooked the recent decisions in the cases of *In re Blackburn's Estate*, 48 Mont. 179, 137 Pac. 381, and *State ex rel. Cotter v. District Court*, 49 Mont. 146, 140 Pac. 732. These decisions are not referred to in the opinion, but they were not overlooked, nor is anything said during the discussion of this case even remotely inconsistent with anything said in either of them. In the first we said: "It is, however, the policy of our law that the widow shall control *in limine* the administration of her late husband's estate. (*Shiels' Estate*, 120 Cal. 347, 52 Pac. 808; *Dorris' Estate*, 93 Cal. 611, 29 Pac. 244.) To that end she is authorized to either administer it herself, or to nominate some person in whom she places trust and confidence to administer it for her. (*In re Watson's Estate*, 31 Mont. 438, 78 Pac. 702.) No condition or limitation is imposed upon her choice save that she or the person she nominates be competent; nor does the fact that she asserts claim to property which the other heirs contend belongs to the estate render her or her nominee incompetent. (Rev. Codes, sec. 7436; *Rice v. Tilton*, 13 Wyo. 420, 80 Pac. 828; *Brundage's Estate*, 141 Cal. 538, 75 Pac. 175; *Estate of Banquier*, 88 Cal. 302, 26 Pac. 178, 532.)" This is entirely in accord with the express declaration found in section 7432 of the Revised Codes. Under this section the surviving wife or husband has the exclusive right to the appointment in the first instance because it is therein so declared, provided he or she is a competent person within the requirements of section 7436. Furthermore, the person so entitled may request some other competent person to be appointed, if he or she does not desire to act. The principal controversy in the case arose upon the question whether, after the wife had exercised the right to have substitution made, the appointment of

the substitute was revocable at the request of the wife when supported by proof that she had been induced by unfair means to consent to the substitution. It was held that upon a proper showing, revocation may be had and the wife be permitted to take the appointment, but that otherwise the waiver of the right is irrevocable. In the second case was involved the question whether the surviving husband was entitled, as against the father of the deceased wife, to be appointed special administrator of her estate pending a contest of the validity of her will. It was held that the right of the husband was exclusive under section 7472 of the Revised Codes, because it is therein provided that in making such appointment preference must be given in the order stated in section 7432. It was there said: "The surviving husband or wife is entitled to general letters of administration, to the exclusion of any other person (Rev. Codes, sec. 7432), unless at least one of the grounds of incompetency enumerated in section 7436 is shown. In selecting a person to act as special administrator, the court or judge is expressly required to give preference to the person who is entitled to letters testamentary or of administration."

Both of these cases refer to the restrictions put upon the power of the court in making the appointment *in limine*. They do not justify the conclusion, even remotely, that this court intended to imply, by anything said in either of them, that such an administrator or executor may with immunity adopt a course of conduct which is not only wasteful of the estate, but is wholly disregarding of the rights of its creditors. This would have been to nullify the power vested in the court by sections 7488 and 7489: To call to strict account and suspend and, if necessary, to remove an administrator or executor who has been guilty of any of the delinquencies therein mentioned. It would be a monstrous doctrine to say that after his appointment the administrator may despoil or waste the estate at his pleasure, leaving those entitled to it without the means of redress. Even without the provisions in these sections, it would seem to us that the power vested in the district court to conduct the ad-

ministration of estates implies also the power to compel the trusted appointee to collect and preserve the assets of the estate put in his charge and to effect a speedy distribution of them to those entitled to share in them. True, insolvency of the estate is not a ground for the refusal of the appointment to the surviving spouse; nor is the fact that it has become insolvent subsequent to the appointment a ground for his or her removal. It is equally true, however, that the sections of the statute *supra* authorizing removal make no distinction between the surviving spouse and any other person whose appointment was properly made in the first place. These sections are aimed at any person who has shown himself incompetent and untrustworthy.

In the original opinion it was pointed out that it is wholly immaterial what claim is made by the executrix to the Runnimede ranch, unless it should be shown on another hearing that the estate is insolvent, and the question must be determined whether it belongs to the estate. It was further pointed out, that, in case this exigency should be shown to exist, a removal of the executrix would be necessary in order that the question of ownership may be determined. It is now insisted that, instead of removing the executrix, the court should appoint a special administrator to bring appropriate action against the executrix. This subject was considered fully in the original opinion. The conclusion there stated is justified on the ground that the administration is an entirety, and there can in the nature of things be but one. It may be justified upon the further ground that jurisdiction in probate is statutory and limited, and authority for what is done by a court in the exercise of it must be directly granted by the statute conferring it, or by necessary implication, and no authority to create a double or divided administration is to be found in the statutes. However this may be, we are not disposed to recede from the conclusion heretofore announced. Certainly the executrix was not rendered incompetent to receive the appointment *in limine* because she asserted claim to property ostensibly belonging to

the estate (*In re Blackburn's Estate, supra*); but when the exigencies which have arisen since her appointment have put her in a position so antagonistic to the creditors that she cannot do justice to them and the estate, and at the same time establish her right, she ought to be relieved from her position and some fit person put in her place. She cannot bring an action against herself. (*Phillips v. Phillips*, 18 Mont. 305, 45 Pac. 221.) Hence the creditors cannot obtain relief.

As to the suggestion that the executrix cannot be deprived [10] of the right to nominate her successor, it may be said that *in limine* she had the right to the appointment, or, as an alternative, to nominate someone to serve in her stead. Having chosen to take the appointment, the right to nominate another was waived. In the case of *In re Blackburn's Estate, supra*, it was held that, the right to the appointment having been deliberately waived by the wife, the renunciation becomes irrevocable. By parity of reasoning it would seem that, when the wife or husband has chosen to take the appointment, it cannot thereafter be renounced and nomination be made instead. But, conceding this to be permissible when the renunciation is voluntary, in case of removal for misconduct or because of an assertion of rights adverse to the estate, the acting husband or wife ought not to be allowed to name a successor, for the reason that the person selected would more than likely be biased in favor of the adverse claim.

Rehearing denied.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

HORSKY, RESPONDENT, v. MCKENNAN ET AL., APPELLANTS.

(No. 3,702.)

(Submitted September 21, 1916. Decided November 20, 1916.)

[162 Pac. 376.]

Ejectment—Trusts—Tax Deeds—Invalidity—Faulty Description of Land—Sale en Masse—Adverse Possession—Estoppel—Statute of Limitations—Appeal and Error—New Trial Order.

Appeal and Error—New Trial Order—Affirmance, When.

1. Where an order granting a new trial is general, it will be affirmed if substantial error occurred in respect to any of the grounds urged; it being presumed that the order was made because of such error.

Trusts—Real Property—Wrongful Transfer by Trustee—Burden of Proof.

2. The burden of proving that a conveyance of real property made by a trustee in contravention of an express trust is void, rests upon him who asserts the invalidity of the instrument.

Real Property—Tax Deeds—Preliminary Notice.

3. The reception of tax deeds in evidence without proof of the fact that the holder of the certificates of purchase gave the thirty day notice of his intention to apply for the deeds, as required by sections 3895 and 3896, Political Code of 1895 (Rev. Codes, secs. 2651, 2652), was error.

Same—Tax Deeds—Notice—Evidence.

4. A tax deed is not even *prima facie* evidence that the holder of the certificate, before applying for the deed, gave the thirty day notice of intention to apply therefor required by law to be given before the deed could issue.

Same—Tax Deeds—Indefinite Description of Land—Effect.

5. A description of land in a tax deed so indefinite that the property (city lots) intended to be conveyed could not be identified except by inference, was ineffective.

Same—Sale en Masse—Void Tax Deed.

6. A tax deed, showing on its face that it was based on a sale *en masse* of several noncontiguous parcels, was void.

Same—Tax Deeds—Estoppel.

7. Tax deeds are antagonistic to the fee; there is no privity between the holder of the one and the holder of the other, and neither owes any duty to, nor is estopped from making any claim against, the other.

Same—Tax Deeds—Estoppel—Case at Bar.

8. That the holder of the fee signed assessment-lists containing faulty descriptions of the property later sold for unpaid taxes; that, though present at the sale, he did not object to the method adopted; and that it was at his instance that the purchaser at the sale ap-

peared, did not estop him to contest the validity of the deeds on the grounds mentioned in paragraphs 5 and 6, *supra*.

Same—Void Tax Deeds—Adverse Possession.

9. While tax deeds, void on their face, were ineffectual to constitute title, they were evidence of a claim of title ample to sustain a *possessio pedis*, sufficient, under general statutes of limitation, to support adverse possession of the lands adequately described.

Same—Ejectment—Adverse Possession—Trusts—Evidence.

10. Where defendants in ejectment relied on adverse possession under tax deeds for more than the statutory period, as well as on estoppel, refusal of an offer of proof that they went into possession under a trust agreement under which they were to hold the property until from the rents and profits thereof they had reimbursed themselves for moneys owing to and for outlays made by them in caring for it, whereupon reconveyance should be made to plaintiff, was error.

Same—Tax Deeds—Action to Set Aside—Statute of Limitations.

11. Chapter 50, Laws of 1909, providing that a right of action to annul a tax deed shall be barred unless instituted within two years after its issuance, presupposes a valid instrument; hence one which is void on its face, and is therefore not a deed but a nullity, does not come within the purview of such provision.

Appeal from District Court, Lewis and Clark County;
J. Miller Smith, Judge.

ACTION by Joseph Horsky against Samuel McKennan and another. From an order granting new trial, defendants appeal. **Affirmed.**

Messrs. Gunn, Rasch & Hall, for Appellants, submitted a brief, and one in reply to that of Respondents; *Mr. M. S. Gunn* argued the cause orally.

The provisions of section 4549, Revised Codes, could not be avoided or circumvented by the mere recital in the deed of reconveyance of the payment of debts and the performance of the trust under the deed of assignment. (See *Briggs v. Palmer*, 20 Barb. (N. Y.) 392; *Russell v. Russell*, 36 N. Y. 581, 93 Am. Dec. 540; *Cruger v. Jones*, 18 Barb. (N. Y.) 467.) Possession of the premises having been voluntarily turned over to Steinbrenner and Adami to hold the property until the trust had been performed, their possession was rightful, and could not be disturbed until the purpose for which possession was originally taken had been fully accomplished. (*Spect v. Spect*,

88 Cal. 437, 22 Am. St. Rep. 314, 13 L. R. A. 137, 26 Pac. 203; *Hubbell v. Moulson*, 53 N. Y. 225, 13 Am. Rep. 519; *Kelso v. Norton*, 65 Kan. 778, 93 Am. St. Rep. 308, 70 Pac. 896; *Fee v. Swingly*, 6 Mont. 596, 13 Pac. 375.)

The description of the property conveyed by tax deeds was sufficient. (1 Cooley on Taxation, 3d ed., 740, 742; *Best v. Wohlford*, 144 Cal. 733, 78 Pac. 293; *Oregon R. Co. v. Umatilla County*, 47 Or. 198, 81 Pac. 352; *Masonic Bldg. Assn. v. Brownell*, 164 Mass. 306, 41 N. E. 306; *Lick v. O'Donnell*, 3 Cal. 59, 58 Am. Dec. 383; *Slaughter v. City of Dallas*, 101 Tex. 315, 107 S. W. 48; *Holley's Exr. v. Curry*, 58 W. Va. 70, 112 Am. St. Rep. 944, 51 S. E. 135.)

The statute in force from 1893 to 1896, and which is still in force, required every owner to make return to the county assessor, and the plaintiff cannot now be heard to say that the description was insufficient. (*San Francisco v. Flood*, 64 Cal. 504, 2 Pac. 264; *Lake County v. Sulphur Bank Q. Min. Co.*, 68 Cal. 14, 8 Pac. 593; *Dear v. Varnum*, 80 Cal. 86, 22 Pac. 76; *Central Pac. R. Co. v. California*, 162 U. S. 91, 40 L. Ed. 903, 16 Sup. Ct. Rep. 766; *Jeffries v. Clark*, 23 Kan. 448; *Benton v. Merrill*, 68 N. H. 369, 39 Atl. 257; *Cairo V. & C. Ry. Co. v. Mathews*, 152 Ill. 153, 38 N. E. 623; *Inland Lumber & T. Co. v. Thompson*, 11 Idaho, 508, 114 Am. St. Rep. 274, 7 Ann. Cas. 862, 83 Pac. 933; *Board of Commrs. v. Anderson*, 68 Fed. 341, 345, 15 C. C. A. 471.)

Neither the fact that the property conveyed by the tax deeds was sold in bulk, nor defects in the notice of redemption, can avail the plaintiff. The statutes which prescribed the mode and manner of sales of property for delinquent taxes in force prior to 1891, and which this court considered and construed in the case of *North Real Estate Loan & T. Co. v. Billings Loan & T. Co.*, 36 Mont. 356, 93 Pac. 40, were abrogated, and a different method was provided by the Revenue Act of 1891, under which the sales in this case were had. Section 115 of that Act (now sec. 2638, Rev. Codes), provides how property on which the taxes

have become delinquent shall be sold. It confers primarily upon the owner the right to designate how his property should be sold, and in case of his failure to do so, the authority to designate is given to the county treasurer. Plaintiff was present at the time of the sale, with a purchaser procured by himself, and who purchased at the plaintiff's solicitation and for the plaintiff's convenience and accommodation. He might have spoken then, but he remained silent. The property was sold just as the plaintiff meant and intended that it should be sold, and he cannot repudiate it now. (*Hewes v. McLellan*, 80 Cal. 393, 22 Pac. 287; *Rollins v. Woodman*, 117 Cal. 516, 49 Pac. 455; *Hayes v. Ducasse*, 119 Cal. 682, 52 Pac. 121.)

By the amendment of section 2654, Revised Codes, attack upon a tax deed upon any ground whatever is precluded after the expiration of two years. (*Ashley Co. v. Bradford*, 109 La. 641, 33 South. 634; *Oconto County v. Jerrard*, 46 Wis. 317, 50 N. W. 591; *Bryan v. McGurk*, 200 N. Y. 332, 93 N. E. 989; *Mead v. Nelson*, 52 Wis. 402, 8 N. W. 895.)

The objection made upon the introduction of the tax deeds in evidence was that they were inadmissible "unless the precedent steps that will authorize the issuance of the tax deeds have been shown to have been fully complied with" was not well taken. (See *Oconto County v. Jerrard*, *supra*; *Pillow v. Roberts*, 13 How. (54 U. S.) 472, 14 L. Ed. 228, and *Saranac L. & T. Co. v. Roberts*, 177 U. S. 318, 44 L. Ed. 786, 20 Sup. Ct. Rep. 642.) So in South Dakota, where the statute required notice of redemption, or of the application for a deed to be given, and where it was contended that that had not been done, it was held in *Bandow v. Wolven*, 20 S. D. 445, 107 N. W. 204, that such omission after the lapse of the statutory limitation was immaterial. To the same effect are *Fleming v. Stearns*, 66 Wash. 655, 120 Pac. 522, *Hoko River Boom Co. v. Fairservice*, 69 Wash. 357, 125 Pac. 145, *Bullis v. Marsh*, 56 Iowa, 747, 2 N. W. 578, 6 N. W. 177, *Monk v. Corbin*, 58 Iowa, 503, 12 N. W. 571, and *Muller v. Mazerat*, 109 La. 116, 33 South. 104.

Messrs. Purcell & Horsky and *Mr. H. G. McIntire*, for Respondent, submitted a brief; *Mr. McIntire* argued the cause orally.

It is incumbent that one offering a tax deed in evidence must prove a compliance with all statutory requirements. Without such proof the deeds are inadmissible. (*Walsh v. Burke*, 134 Cal. 594, 598, 66 Pac. 866; *Johnson v. Canty*, 162 Cal. 391, 123 Pac. 263; *Johnson v. Taylor* 150 Cal. 201, 119 Am. St. Rep. 181, 10 L. R. A. (n. s.) 818, 88 Pac. 903.) The certificates of sale do not state where the property is situated, i. e., no town or city is designated. The court cannot take judicial notice that these lands are situated in Helena. (*Oldham v. Ramsner*, 149 Cal. 540, 87 Pac. 18, 19.) The description shown is bad, and cannot be aided by evidence *aliunde*. (*Keane v. Cannovan*, 21 Cal. 291, 293, 82 Am. Dec. 738; *Roberts v. Chan Tin Pen*, 23 Cal. 259, 267; *Wilson v. Jarron*, 23 Idaho, 563, 131 Pac. 12; *Pope v. Alexander*, 36 Mont. 82, 83, 92 Pac. 203, 565; 7 R. C. L. 713, 716; 37 Cyc. 1445-1449.) "Every requisite having the semblance of benefit to the owner must be complied with, and where the form of a statutory proceeding is prescribed, its observance becomes essential to the validity of the proceedings." (*Shipman v. Forbes*, 97 Cal. 572, 32 Pac. 599; *Warden v. Broome*, 9 Cal. App. 172, 98 Pac. 252.)

The notice of intention to apply for tax deeds, together with the record thereof, is jurisdictional (Rev. Codes, sec. 2652). It is the source and measure of the treasurer's power to act; the burden is upon the purchaser to show that it was given; it cannot be presumed. And evidence *dehors* the notice and affidavit is inadmissible. (*Cullen v. Western Mortgage etc. Co.*, 47 Mont. 513, 526, 527, 134 Pac. 302; *Simmons v. McCarthy*, 118 Cal. 622, 50 Pac. 761; *Brown v. Pool*, 81 Iowa, 455, 9 L. R. A. 767, 46 N. W. 1069; *Reed v. Lyon*, 96 Cal. 501, 31 Pac. 619; *Wetherbee v. Johnston*, 10 Cal. App. 264, 101 Pac. 802; *Clarke v. Mead*, 102 Cal. 516, 36 Pac. 862; *Walsh v. Burke*, 134 Cal. 594, 66 Pac. 866; *Emeric v. Alvarado*, 90 Cal. 444, 27 Pac. 356; *Johnson v.*

Taylor, 150 Cal. 201, 119 Am. St. Rep. 181, 10 L. R. A. (n. s.) 818, 88 Pac. 903.)

The deeds show that the property sold consisted of separate, distinct and nonadjacent parcels, and that the same were sold *en masse*. This, standing alone, would render them void on their face. (*North Real Estate Loan etc. Co. v. Billings L. & T. Co.*, 36 Mont. 356, 93 Pac. 40; *Eldridge v. Robertson*, 19 Okl. 165, 92 Pac. 156.) Parol evidence to show that parcels were sold separately is inadmissible. (*Wyer v. La Rocque*, 51 Kan. 710, 33 Pac. 547.)

The deed to the parcels situated on lot 14 of the Thompson Placer is broader than the certificate of sale, in that the city where the land is situated is named. This the treasurer had no right to amplify, the rule being that if the prior description is imperfect and insufficient, evidence cannot be had to amplify it, and the deed is void. (*Eastman v. Gurrey*, 15 Utah, 410, 49 Pac. 310; *Wilson v. Jarron*, 23 Idaho, 563, 131 Pac. 12.)

“A tax deed of one-fourth No. 5 R. 8 W. E. L. S. is void for vagueness of description of the premises as it leaves undefined which ‘fourth.’ ” (*Larrabee v. Hodgkins*, 58 Me. 412.) This description is void for uncertainty. (37 Cyc. 1447.)

A tax deed void on its face, or void because of failure to comply with some jurisdictional prerequisite, does not start the statute of limitations. (*Empire Ranch & Cattle Co. v. Brownson*, 26 Colo. App. 228, 142 Pac. 421; *Steinmuller v. City of Kansas*, 3 Kan. App. 45, 44 Pac. 600; *Taylor v. Miles*, 5 Kan. 498, 7 Am. Rep. 558; *Lain v. Shepardson*, 18 Wis. 59, 64; *Keller v. Hawk*, 19 Okl. 407, 91 Pac. 778; *Coulter v. Stafford*, 56 Fed. 564, 6 C. C. A. 18; Cooley on Taxation, p. 564.)

A tax deed which discloses that distinct parcels of land were sold together for a gross sum is void on its face, and does not set running a special statute of limitations. (27 L. R. A. (n. s.) note, p. 355.)

The settled doctrine of the courts concerning tax proceedings is that every requisite having the semblance of benefit to the owner must be complied with. (*Birney v. Warren*, 28 Mont.

64, 68, 72 Pac. 293; Cooley on Taxation, 266, 274; *Weyse v. Crawford*, 85 Cal. 196, 24 Pac. 735; *Shipman v. Forbes*, 97 Cal. 572, 32 Pac. 599.)

MR. JUSTICE SANNER delivered the opinion of the court.

This is an appeal from an order granting a new trial. The [1] order is general, but the grounds urged in support of it were based upon the action of the trial court in directing a verdict for the defendants and upon sundry rulings in the admission and exclusion of evidence. If substantial error occurred in respect to any of these, the order must be affirmed upon the assumption that it was made because of such error.

The action is in ejectment, and, according to the complaint, involves certain parcels of land situate in the city of Helena. Of these, the plaintiff, respondent here, alleges that he is the owner and entitled to the possession; he also avers that on May 7, 1914, the defendants without right or title ousted and ejected him therefrom, and that they have ever since unlawfully withheld, and now unlawfully withhold, such possession from him. The answer is elaborate. Its effect is a general denial; a plea of title and right to possession under and by virtue of two certain tax deeds issued to Henry Adami and John Steinbrenner; a plea of adverse possession since March 1, 1897, under said tax deeds; separate pleas of Code sections 6432, 6436, and 2654 (as amended by Chapter 50, Session Laws of 1909), as statutes of limitation; and a plea of estoppel to deny title, based upon plaintiff's knowledge and acquiescence since March 1, 1897, in the procurement of said tax deeds by Adami and Steinbrenner, the delivery of the property to them, and the payment by them of large sums of money for care of the property, improvements thereon, and taxes, as well as upon actual recognition by the plaintiff of their ownership and dominion over said property in virtue of said tax deeds. The affirmative allegations of the answer were put in issue by the reply.

I. Upon the trial the plaintiff, to show title, established [2] that on August 2, 1893, he was the owner of the premises in

question; that on that day he made a deed of assignment thereof for the benefit of his creditors to Antone Horsky, and that on May 7, 1914, Antone Horsky reconveyed the same to him by formal deed, reciting, among other things, that "the conditions, terms and trusts of said deed of assignment" had been completed and fulfilled. The sufficiency of this showing was challenged by a motion for nonsuit, and that challenge is renewed here upon the ground that without proof *aliunde* of full compliance with the conditions, terms and trusts of the deed of assignment, the reconveyance had no probative value because, under section 4549, Revised Codes, every transfer or other act of the trustees of an express trust in relation to real property, in contravention of such trust, is absolutely void. This contention misplaces the burden of proof. Whether section 4549 be viewed alone and held, as in New York, to mean that such conveyances are absolutely void into whatever hands they come (*Briggs v. Palmer*, 20 Barb. (N. Y.) 392; *Russell v. Russell*, 36 N. Y. 581, 93 Am. Dec. 540), or considered in connection with provisions similar to section 5386, and held, as in other states, to mean that such conveyances are voidable in the hands of a grantee with notice at the suit of the party aggrieved (note, 19 Am. St. Rep. 267, 297), it is perfectly clear that not all conveyances by such trustees are *prima facie* void or voidable. They are void or voidable only if made in contravention of the trust, and as this presumably is not the character of any given conveyance, the burden is necessarily upon him who asserts, to prove that such is its character.

II. The defendants grounded their resistance upon title under and by virtue of the tax deeds. These were made and delivered in purported pursuance of certificates previously issued upon sales for delinquent taxes for 1893 and 1894, and were received in evidence over the plaintiff's objection that they were inadmissible without a showing of compliance with the precedent steps required by law for their issuance, and because, being deficient in description and showing a sale *en masse*, they are void upon their face. Later the plaintiff himself offered the certifi-

cates of sale upon which the deeds purport to be based, and also the notices of application for the deeds, for the purpose of affirmatively showing that the statutory prerequisites had not been met; and these were all rejected as immaterial and irrelevant, in view of the provisions of Code section 2654, as amended by Chapter 50, Session Laws of 1909.

(a) The deeds in question were issued February 26, 1897. An [3, 4] essential prerequisite to their issuance was that the holders of the certificates should, thirty days before applying for such deeds, give, in a certain manner, a certain kind of written notice of their intention to apply for such deeds (Laws 1891, p. 114, secs. 128, 129; Pol. Code 1895, secs. 3895, 3896 [Rev. Codes, secs. 2651, 2652]), and it is settled in this state that a tax deed is not even *prima facie* evidence that this was done. (*Cullen v. Western Mtg. & W. Title Co.*, 47 Mont. 513, 527, 134 Pac. 302.) The deeds, therefore, should not have been received in the first instance without proof of that fact, unless, as the defendants insist, the effect of Code section 2654, as amended, is to foreclose all inquiry into such matters.

(b) The deed given for the taxes of 1893 recites the steps [5] leading up to the sale, and says: "That the least quantity or smallest portion of the property assessed, situate, lying and being within the said county of Lewis and Clark, state of Montana, and described thus: Part of lot number fourteen (14) Thompson Placer being 214 feet on the east side of Main Street and 216 feet on the west side of Main Street and 224 feet on the east side of Gulch Street, and 224 feet on the west side of Gulch Street, also lot fifteen (15) Thompson Placer, and lot ten (10) and eleven (11) block five hundred and sixty-nine (569) Central Addition was by such county treasurer aforesaid, on the nineteenth day of January, 1894, in accordance with law and to pay said taxes, charges and costs delinquent as aforesaid offered at public auction in front of the county courthouse of said county of Lewis and Clark in the city of Helena therein. That at said auction Ella L. Knowles was the bidder who was willing to take the least quantity or the smallest portion of the

said land and pay the taxes, costs and charges due thereon, which taxes, costs and charges (including fifty cents for the certificate of sale) amounted to the sum of two thousand sixty-three and 70/100 dollars; that the said least quantity or smallest portion of the said land, lying and being within the said county of Lewis and Clark, state of Montana, described as follows, to-wit: One-half of part of lot 14 Thompson Placer, being 214 feet east side of Main Street, and 216 feet west side of Main Street, and 224 east side of Gulch Street, and 224 feet west side of Gulch Street, also lot 15 Thompson Placer, and lots 10, 11, block 569, Central Addition was by the said R. P. Barden as county treasurer aforesaid, struck off to the said Ella L. Knowles, who paid the full amount of the said taxes, costs and charges and therefore became the purchaser of the last-described piece or parcel of land; that the said real estate last aforesaid was sold for taxes and subject to redemption pursuant to the statute in such cases made and provided"—and is therefore granted and conveyed to John Steinbrenner and Henry Adami, the assignees of such purchasers. In neither description above quoted, nor anywhere else in this deed, is there anything to tell where in Lewis and Clark county the property offered, sold, and conveyed is situate; nor, drawing upon information otherwise had, that the property is in Helena, is it possible to visualize or locate the part of lot 14, Thompson Placer, which was offered for sale. We may infer that Main and Gulch Streets run approximately north and south, since they have east and west sides, so that the land, considered as a single tract, has a specified frontage on each side of these streets; but at what points on each of these streets the frontage begins and ends, and how far back of such frontage the property goes, we cannot tell. These frontages are mere lines, and the utmost derivable from the description is that somewhere within the limits of lot 14, Thompson Placer, there is a widening tract of indefinite dimensions which crosses the east side of Main Street with a spread of 214 feet, the west side with 216 feet, and Gulch Street with 224 feet. Moreover, not all the part of lot 14, Thompson Placer, which was

offered was sold, but only one-half of said part; which half, or whether an undivided half interest, we are not informed. A description in a tax deed which is so indefinite that the land intended to be conveyed cannot be identified is ineffective. (37 Cyc. 1445 *et seq.*; Black on Tax Titles, secs. 405–407; Blackwell on Tax Titles, secs. 758–769; *McRoberts v. McArthur*, 62 Minn. 310, 64 N. W. 903; *Moran v. Thomas*, 19 S. D. 469, 104 N. W. 212; *Keane v. Cannovan*, 21 Cal. 291, 301 *et seq.*, 82 Am. Dec. 738; *Dickinson v. Arkansas City Imp. Co.*, 77 Ark. 570, 113 Am. St. Rep. 170, 92 S. W. 21.)

(c) As a matter of fact, however, the deed shows on its face—**[6]** if the property be in the city of Helena—that the part of lot 14, Thompson Placer, attempted to be described is not and cannot be a single tract. It is severed by both Main and Gulch Streets, so that we have at least three, and perhaps four, separate, noncontiguous parcels, *viz.*, a parcel of unknown depth with 214 feet frontage on the east side of Main Street; a parcel with 216 feet frontage on the west side of Main Street, and (if Gulch Street be the next parallel street on the west with no alley intervening) a 224 feet frontage on the east side of Gulch Street, or else two parcels of unknown depth having these separate frontages; and a parcel of unknown depth with a frontage of 224 feet on the west side of Gulch Street. (*North Real Estate, Loan etc. Co. v. Billings L. & T. Co.*, 36 Mont. 356, 367, 93 Pac. 40.) Besides these, we have lot 15, Thompson Placer, and lots 10 and 11 in block 569, Central Addition—all offered for sale and sold *en masse*. Such a sale has been thrice condemned by this court as in contravention of the Revised Statutes of 1879, without reference to any provision such as section 115 of the Revenue Law of 1891. (*Casey v. Wright*, 14 Mont. 315, 36 Pac. 191; *North Real Estate, Loan etc. Co. v. Billings L. & T. Co.*, *supra*; *Cullen v. Western Mtg. etc. Co.*, *supra*.) Every consideration which moved to the result in those decisions applies here—the assessment-book must *list* all the property within the county, specifying open land by legal subdivisions or by metes and bounds, and city property by lot and block, with the values extended, a *list*

of the delinquent property must be filed and advertised, "showing the amount of taxes and costs due opposite each name and description," the county treasurer must sell the property advertised, "commencing at the head of the list and continue in alphabetical or numerical order of lots and blocks until completed"—and that result is aided by the clear intent of section 115 of the Revenue Act of 1891, to-wit, that in the case of any parcel of land offered for sale the owner, or if he does not, the treasurer may designate a portion less than the whole to be sold, and only to the county may the entire property assessed be struck off for want of purchasers. (*Rush v. Lewis & Clark County*, 36 Mont. 566, 93 Pac. 943; *Id.*, 37 Mont. 240, 95 Pac. 836; *Dyke v. Whyte*, 17 Colo. 296, 29 Pac. 128.) Certain cases from California—*Doland v. Mooney*, 79 Cal. 137, 21 Pac. 436; *Hewes v. McLellan*, 80 Cal. 393, 22 Pac. 287; *Rollins v. Woodman*, 117 Cal. 516, 49 Pac. 455; *Hayes v. Ducasse*, 119 Cal. 682, 52 Pac. 121—are cited to support the view that the sale in question here was conformable to section 115 of the Revenue Act of 1891. In each of these cases the property offered was a single lot or parcel, and the effect of each decision is that, where the owner of a single lot or parcel does not require the offer of a portion thereof or of an interest therein, the treasurer may sell the whole lot or parcel if that is the least quantity anyone will take and pay the tax, something entirely different from selling a number of separate, noncontiguous parcels *en masse*. We entertain no doubt that such a sale as this deed discloses was in contravention of the law and the deed which shows it is void on its face. (*North Real Estate Loan etc. Co. v. Billings L. & T. Co.*, *supra*; *Rush v. Lewis & Clark County*, *supra*.)

The deed for the taxes of 1894 is open to the same reflections, except that it does not sell one-half of part of lot 14, Thompson Placer, and does make it clear beyond the need of inference that the part of lot 14, Thompson Placer, offered and sold is composed of separate, noncontiguous parcels. So, too, the evidence establishes this latter fact, and shows how difficult, if not impossible, would be the task of applying to any of these parcels

the description set forth in the deeds. Since these deeds are void on their face, further consideration of the proof in this respect, or of the offer to show that the other statutory requirements were not met, is unnecessary.

Besides relying on the provisions of section 2654, Revised [7, 8] Codes, as amended, the defendants seek to escape the effect of the above condition because, as they say, the description is substantially the same as that contained in the assessment-lists for the years 1893 and 1894 signed by the plaintiff, and in similar lists signed by him for the years prior to 1893 on which he paid taxes, because he was present when the sale for the 1894 taxes was had and made no objection to the method of it, and because it was at his instance that the purchaser to whom the property was struck off appeared. We do not see that this is decisive. Tax titles are not derived from the fee, but are antagonistic to the fee; there is no privity between the holder of the one and the holder of the other; neither owes any duty to the other nor is estopped, because of his situation, from making any claim against the other. (*Hussman v. Durham*, 165 U. S. 144, 147, 41 L. Ed. 664, 17 Sup. Ct. Rep. 253; *Crum v. Cotting*, 22 Iowa, 411.) If, therefore, it be a fact that the plaintiff signed, and in the years before had paid taxes upon, lists containing similar descriptions, the utmost to be said of it is that such descriptions might have sufficed to authorize the sale of his lands; but it was the lands—not the descriptions—that were to be sold for the delinquent taxes, and the duty of the treasurer was to sell them parcel by parcel, describing each in his certificate and deed so that each parcel, with the amount paid for it, could be identified. This the treasurer failed to do, and his failure cannot be excused or corrected by anything that plaintiff said or did about the lists. Moreover, the plaintiff testifies that he had nothing to do with describing the property in the assessment-lists; that though he knew the ground, he could not have described it in writing, and that he signed the lists as prepared by the assessor, believing that he would not be taxed for any property but his own. Hence the whole matter, if

material, was a question for the jury. Nor was the plaintiff called upon to object to the method of the sale. He was not then the record owner of the property, but, conceding that, as the party ultimately interested in it, he could have made objection, there is nothing to show that the treasurer sold as he did, or the purchaser bought as he did, in consequence of the plaintiff's silence. He had the right to assume that the treasurer was proceeding according to law, and neither his failure nor that of the purchaser to realize the contrary could make legal what had no validity.

III. Error is claimed because of the rejection of plaintiff's offers of proof numbered 1 and 2, and the order directing the jury to find for the defendants. Offer No. 1 is not entirely intelligible to us; but the purpose and effect of offer No. 2 are perfectly clear. The defendants had pleaded, and at the trial relied upon, adverse possession under the tax deeds for more than ten years, claiming the bar of sections 6432 and 6436, [9] Revised Codes. While these deeds, being void on their face, were ineffectual to constitute title, they were evidence of a claim of title ample to sustain a *possessio pedis* (*Morrison v. Linn*, 50 Mont. 396, 147 Pac. 166), if not, as some authorities insist, color of title sufficient, under general statutes of limitation, to support adverse possession of the lands adequately described. (Wood on Limitations, sec. 259; note, 27 L. R. A. (n. s.) 339 *et seq.*) So that, as a portion at least of this property [10] was in the actual possession of the defendants, the question whether such possession was adverse became from this point of view, a material one. The position of the plaintiff was that Adami and Steinbrenner went into possession under an agreement made in 1896 to hold the property and pay the moneys due thereon for their obligations and outlays, from the rents and profits or from the proceeds of any sales which might be made, the property or residue thereof to be after such payment conveyed back to the plaintiff. This the evidence offered tended to show, and such showing, coupled with other evidence offered and received, to the effect that no repudiation of this agreement

occurred until 1914, would have made a case for the jury, so far as the bar of sections 6432 and 6436 is concerned. So, too, the issue made by the pleadings touching the estoppel of plaintiff to deny title in Adami and Steinbrenner under the tax deed, based on plaintiff's knowledge of their procurement of the tax deed, the delivery of the property to them, and the payment by them of moneys for upkeep and taxes was for the jury; for these very circumstances are fatal to the estoppel if, as the plaintiff asserts, they occurred in consequence of the agreement last referred to. As to the alleged recognition by the plaintiff of the ownership and dominion over the property by Adami and Steinbrenner in virtue of the tax deeds, the evidence was conflicting. It must be held, therefore, that in the rulings above mentioned there was error sufficient to command a new trial, unless the entire matter was settled and foreclosed by the provisions of section 2654, as amended by Chapter 50, Session Laws of 1909.

IV. We come, then, to the force and effect in this case of the [11] section last mentioned. It provides that: "No action can be maintained to set aside or annul a tax deed upon any ground whatever, unless the action is brought within two years from and after the date of issuance of such tax deed; provided, that any existing right of action to set aside or annul any tax deed, heretofore issued, shall be barred unless instituted within two years from and after the passage and approval of this Act." This action was commenced on May 9, 1914, more than five years after the enactment, and its purpose is to have set aside or annulled the instruments on which the defendants' assertion of title and right to possession is based. If these instruments can be considered tax deeds in the sense of the statute, then the statute applies, and all the rulings above mentioned may be defended or ignored. This, however, cannot be done, because these instruments are, as shown above, void on the face of them; they are not deeds, but nullities. In *Cullen v. Western Mfg. etc. Co.*, *supra*, we had occasion to consider this statute. Holding it to be a special or short statute of limitations, we said, in

effect, that it cannot be invoked to buttress a tax deed void upon its face; and, as this is in harmony with the vast weight of authority (*Davidson v. Wampler*, 29 Mont. 61, 70, 74 Pac. 82; *McGillic v. Corby*, 37 Mont. 249, 254, 17 L. R. A. (n. s.) 1263, 95 Pac. 1063; note, 27 L. R. A. (n. s.) 347 *et seq.*; *Nind v. Myers*, 15 N. D. 400, 8 L. R. A. (n. s.) 157, 109 N. W. 335; *Lowenstein v. Sexton*, 18 Okl. 322, 90 Pac. 410, 411; *Moore v. Brown*, 11 How. (52 U. S.) 414, 13 L. Ed. 751; 5 Rose's Notes on U. S. Reports, pp. 44, 45; *Redfield v. Parks*, 132 U. S. 239, 250, 33 L. Ed. 327, 10 Sup. Ct. Rep. 83; *Page v. Gillett*, 47 Colo. 289, 107 Pac. 290; *Salmer v. Lathrop*, 10 S. D. 216, 72 N. W. 570), we cannot hesitate to say that these instruments are not within the statute, and were not effectual to start its operation.

V. Counsel earnestly insist that the order granting a new trial overturned a result which the record shows to have been right, whether viewed from the position of the plaintiff or from that of the defendants. They argue that the plaintiff relied on title through the assignee, whose deed was proved by them to be without authority, because their obligations had not been paid. It may be doubted whether the defendants are in position to make this contention, as they do not claim under the trust established by the deed of assignment, but in hostility to it. However that may be, there was evidence sufficient to take to the jury the question whether in point of fact the obligations intended to be secured by this deed of assignment had been paid.

Ample reason appearing for the order appealed from, the same is accordingly affirmed. *Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

Rehearing denied January 25, 1917.

ROBITAILLE, ADMR., APPELLANT, v. BOULET, RESPONDENT.

(No. 3,705.)

(Submitted September 22, 1916. Decided November 20, 1916.)

[161 Pac. 163.]

Deeds Absolute — Mortgages — Evidence—Sufficiency—Appeal and Error—Briefs—Specification of Errors—Equity Cases—Findings—Sufficiency—Review.

Appeal and Error—Briefs—Specification of Errors.

1. Where appellant's only contention was that the evidence in an equity case was insufficient to sustain the court's findings, his failure to comply with the court's rule requiring appellant's brief to contain a specification of errors, *held* insufficient to command a dismissal of the appeal.

Deeds Absolute—Mortgages—How Character of Instruments Determined.

2. Whether a deed absolute on its face was to evidence a sale or security for a debt only depends upon the intention of the parties at the time of the transaction.

[As to parol evidence supplementing deed by proof of collateral oral agreement, see note in *Ann. Cas.* 1914A, 455.]

Equity Cases—Findings—Insufficient Evidence—Review.

3. The appellant in an equity case claiming that the evidence is insufficient to sustain the court's findings has the burden of showing that it preponderates against them.

Deed Absolute—Mortgage—Evidence—Sufficiency.

4. Evidence *held* sufficient to support the court's finding that a deed absolute on its face was intended to evidence a sale, and not a mortgage.

Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.

ACTION by Mose Robitaille, as administrator of the estate of Frank Robitaille, against J. W. Boulet. From a judgment for defendant and an order denying a new trial, plaintiff appeals. Affirmed.

Mr. Edward F. O'Flynn, for Appellant, submitted a brief, and argued the cause orally.

"The continued adverse possession of lands by the vendor after his formal conveyance of the legal title is a fact in conflict with the legal effect of his deed, and is presumptive evidence

that he still retains an interest in the premises." (*Pell v. McElroy*, 36 Cal. 268; *Peugh v. Davis*, 96 U. S. 332, 338, 24 L. Ed. 775, 777; *Groff v. State Bank*, 50 Minn. 234, 36 Am. St. Rep. 640, 52 N. W. 651.)

The intention of the parties in the transaction is an important element in determining whether or not the deed was a mortgage. (27 Cyc. 1007; *Cobb v. Day*, 106 Mo. 278, 17 S. W. 323; *Miller v. Ausenig*, 2 Wash. Ter. 22, 3 Pac. 111; *Peugh v. Davis*, *supra*.)

Evidence that a party did not pay taxes on land to which he has a deed is admissible as tending to rebut his claim of ownership, and to show that the deed was given as a mortgage. (*Stevens v. Hulin*, 53 Mich. 93, 18 N. W. 569; *O'Toole v. Omlie*, 8 N. D. 444, 79 N. W. 849; 27 Cyc. 1015, 1016, and note.)

In a case such as this, it is competent to show that the deceased was in financial straits at the time he made the deed. (*Russell v. Southard*, 12 How. (53 U. S.) 139, 13 L. Ed. 927; *Morris v. Nixon*, 1 How. (42 U. S.) 118, 11 L. Ed. 69.)

As to the law in relation to declaring a deed absolute on its face a mortgage, see *Peugh v. Davis*; *O'Toole v. Omlie*; *Miller v. Ausenig*, *supra*; *Lee v. Evans*, 8 Cal. 424; *Pierce v. Robinson*, 13 Cal. 116, 129; *Husheon v. Husheon*, 71 Cal. 407, 12 Pac. 410; *Byrne v. Hudson*, 127 Cal. 254, 59 Pac. 597; 2 Washburn on Real Property, p. 42.

Mr. William Meyer, for Respondent, submitted a brief and argued the cause orally.

Before a court will find a deed absolute on its face to be a mortgage, the proof must be clear, unequivocal and convincing. (27 Cyc. 1024 (4); *Jasper v. Hazen*, 4 N. D. 1, 23 L. R. A. 58, 58 N. W. 454; *Armor v. Spalding*, 14 Colo. 302, 23 Pac. 789.) And in *Devore v. Woodruff*, 1 N. D. 143, 45 N. W. 701, it was held that even where there was a separate agreement to reconvey on the payment of a specified sum, this was not conclusive proof that an absolute deed was intended as a mortgage. In *Larson v. Dutiel*, 14 S. D. 476, 85 N. W. 1006, it was held that where a

deed was given to mortgaged premises in satisfaction of promissory notes, which notes were not returned to the grantor, this was an absolute conveyance.

In *Sullivan v. Woods*, 5 Ariz. 196, 50 Pac. 113, it was held that a mere preponderance of the evidence was not sufficient to show a deed absolute on its face to be a mortgage.

The first case in which this question was raised in this state was in the case of *Gassert v. Bogk*, in which it was held that a deed and contemporaneous agreement to reconvey did not constitute a mortgage unless the deed is shown to have been given as security for the performance of some act or obligation or for the payment of a debt. (*Gassert v. Bogk*, 7 Mont. 585, 1 L. R. A. 240, 19 Pac. 281.) This proposition next received consideration in the case of *Kleinschmidt v. Kleinschmidt*, 9 Mont. 477, 484, 24 Pac. 266, where it was held that a deed absolute with a bond to reconvey was not a mortgage unless the evidence showed that it was intended as such. More recently this proposition was considered in the case of *Murray v. Butte-Monitor Tunnel Min. Co.*, 41 Mont. 449, 110 Pac. 497, 112 Pac. 1132. In this case all the authorities are reviewed upon this subject, and while it was there decided that the sale was only intended as a pledge, the facts were not at all similar to the facts in the case at bar. The facts in the case at bar are identical with those in the case of *Morrison v. Jones*, 31 Mont. 154, 77 Pac. 507. In that case the court held that the deed was not a mortgage, even though there was an agreement executed wherein the grantor was given permission to repurchase the property, upon making certain payments.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On September 27, 1909, Frank Robitaille, by a deed absolute in form, conveyed to J. W. Boulet a ranch, consisting of approximately 1,100 acres, situated at Feely Station, in Silver Bow county. In June, 1912, Robitaille died, and the administrator of his estate instituted this suit to have the deed de-

clared to be a mortgage, to secure an accounting of rents and profits, and to redeem the property. The only material issue raised by the pleadings is whether the conveyance was intended to evidence an absolute sale or security for a debt. The trial resulted in favor of defendant, and plaintiff appealed from an order denying him a new trial.

1. *On the Motion to Dismiss.* In the preparation of his brief, [1] counsel for appellant apparently made no effort to comply with rule 10, subdivision 3b, of the rules of this court (123 Pac. xii). There are not any specifications of errors, but since there is but a single contention made, viz., that the evidence is insufficient to sustain the findings, we overlook the shortcomings of counsel in this instance in order to reach the merits of the controversy. The motion to dismiss is overruled.

2. *On the Merits.* The solution of the question presented depends altogether upon the intention of the parties to the transaction of September 27, 1909. (27 Cyc. 1007.) The evidence offered by the plaintiff tended to prove that the transaction [3, 4] had its inception in an application by Robitaille to Boulet for a loan; that Robitaille was in financial straits and pressed by a creditor who had a mortgage upon his ranch; that Boulet gave to Robitaille an agreement of some sort, by the terms of which the ranch could be repurchased at the end of one year for a fixed sum; that Robitaille retained possession of the ranch; that for the subsequent years the ranch was assessed to Robitaille; that Robitaille made payments of considerable sums to Boulet after the transaction; that a contemporaneous agreement with reference to Robitaille's personal property lends aid to plaintiff's theory; and that the ranch was reasonably worth a very much greater sum than passed as the consideration for the deed. These facts and circumstances, if standing alone and unexplained, would warrant a finding that the deed was intended as a mortgage to secure an existing indebtedness. (*Murray v. Butte-Monitor Tunnel Min. Co.*, 41 Mont. 449, 110 Pac. 497, 112 Pac. 1132.)

Unfortunately for plaintiff, the facts and circumstances enumerated above do not stand alone, and are not unexplained. Moreover, in this court, plaintiff must sustain the burden of showing that the evidence preponderates against the trial court's findings. (*Gibson v. Morris State Bank*, 49 Mont. 60, 140 Pac. 76.) The evidence as a whole is in sharp conflict as to the character of the possession by Robitaille after September 27, 1909, as to who defrayed the expense of operating the ranch and improving it, as to who paid the taxes, and as to the value of the ranch at the time the deed was given. Defendant offered evidence to the effect that Robitaille's application for a loan was rejected altogether; that the transaction was a sale outright; that for a valuable consideration, subsequently passed to him; Robitaille surrendered his contract to repurchase; that the transaction relating to the personal property was independent of the one relating to the real estate; that after September 27, 1909, Robitaille frequently disclaimed any interest in this ranch, and finally made homestead entry on 160 acres of government land located near by. An explanation of the payments made by Robitaille to Boulet, after September 27, 1909, was also tendered.

The trial court, with the witnesses before it, and therefore in a better position than are the members of this court to pass upon their credibility and the weight to be given to the testimony, accepted defendant's theory of the transaction, and found that the deed was intended to evidence an absolute sale, and was not intended as a mortgage to secure an indebtedness. Having accepted defendant's evidence as true, that finding is amply supported by the record. (*Morrison v. Jones*, 31 Mont. 154, 77 Pac. 507.)

Appellant has failed to sustain the burden of showing that the evidence preponderates against the findings, and for this reason the order is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

ALBERS, RESPONDENT, v. BARNETT ET AL., APPELLANTS.

(No. 3,708.)

(Submitted September 23, 1916. Decided November 24, 1916.)

[161 Pac. 518.]

Counties—Claims—Appeal—District Court—Parties—Jurisdiction—Judgment—Extent.**Counties—Claims—Appeal—District Court—Parties.**

1. On appeal from an order of the board of county commissioners allowing or disallowing a claim against the county (Rev. Codes, secs. 2947, 2948), the parties are the county and the claimant, or, in a taxpayer's suit, the county and the objecting taxpayer.

Same—Claims—Appeal—Extent of Jurisdiction of District Court.

2. The jurisdiction of the district court on appeal from an order made by county commissioners allowing or disallowing a claim against the county is limited to the determination of the question whether the action of the board was correct and to a declaration affirming or reversing it, with a judgment for costs.

Same—Erroneous Judgment.

3. On appeal by a taxpayer from an order of the county commissioners allowing a claim against the county, the district court adjudged that the claim had been allowed and a warrant issued in payment thereof without authority of law, and that the county was entitled to recover back the amount of the warrant, *held* error under the rule *supra* (par. 2).

Appeal from District Court, Beaverhead County; Wm. A. Clark, Judge.

PROCEEDINGS before the Board of Commissioners of Beaverhead County by C. C. Barnett for allowance of a claim for the care of the county poor. From an order of the board allowing the claim, John G. Albers, as a taxpayer, appealed to the district court. There was judgment that the claim had been allowed and warrant issued without authority of law, and that the county was entitled to recover from Barnett and his sureties, Leonard Eliel and O. M. Best, the amount specified in the warrant, and from an order denying the motion of the defendants for new trial, they appeal. Reversed and remanded.

Messrs. Rodgers & Gilbert, for Appellants, submitted a brief; *Mr. Henry G. Rodgers* argued the cause orally.

It was the absolute duty of the county to provide for the care and maintenance of the indigent sick or otherwise dependent

poor of the county. (Rev. Codes, secs. 2050 *et seq.*, 2894, 3199. *Seagraves v. City of Alton*, 13 Ill. 366.)

When a contract is entered into between a public corporation and a private individual, even though such contract be void for want of authority in the public corporation, to execute the same, yet, if the contract is not immoral, inequitable or unjust, and the contract is performed in whole or in part by one of the parties and the other party receives benefits by reason of such performance over and above any equivalent rendered in return, the party receiving such benefits will be required to place the other party *in statu quo*, by accounting therefor. (*Brown v. City of Atchison*, 39 Kan. 37, 7 Am. St. Rep. 515, 17 Pac. 465; *Morse v. Board of Commrs. of Granite County*, 19 Mont. 450, 48 Pac. 745; *Moss v. Sugar Ridge Tp.* (Ind. App.), 67 N. E. 460; *Shoemaker v. Buffalo Steam Roller Co.*, 83 Misc. Rep. 162, 144 N. Y. Supp. 721; *Contra Costa Water Co. v. Breed*, 139 Cal. 432, 73 Pac. 189; *Village of Pillager v. Hewett*, 98 Minn. 265, 107 N. W. 815; *Livingston v. School District*, 11 S. D. 150, 76 N. W. 301.)

The most that can be said is that in letting the contract there was an imperfect or defective attempt to comply with the law, upon the part of the board of county commissioners. The bidder cannot be required at his peril to examine minutely every step taken for technical flaws in the proceedings. Nor does the law make it his duty to do more than to see that the board with whom he is contracting is proceeding within its powers. (*Wentink v. Board of Chosen Freeholders*, 66 N. J. L. 65, 48 Atl. 609; *Bigelow v. City of Perth Amboy*, 25 N. J. L. 297; *Knapp v. City of Hoboken*, 38 N. J. L. 371; *Tappan v. Long Branch etc. Imp. Comm.*, 59 N. J. L. 371, 35 Atl. 1070; *Moore v. Mayor etc. of New York*, 73 N. Y. 238, 29 Am. Rep. 134.)

Under the circumstances of this case the appellants should not be held remediless. (*Keith v. City of Duquoin*, 89 Ill. App. 36; *Schipper v. City of Aurora*, 121 Ind. 154, 6 L. R. A. 318, 22 N. E. 878; *Rogers v. City of Omaha*, 76 Neb. 187, 107 N. W. 214; *Lincoln Land Co. v. Village of Grant*, 57 Neb. 70, 77 N. W.

349; *Pittsburgh, C. & St. L. R. Co. v. Keokuk etc. Bridge Co.*, 131 U. S. 371, 33 L. Ed. 157, 9 Sup. Ct. Rep. 770; *Paul v. City of Kenosha*, 22 Wis. 266, 94 Am. Dec. 598; *Chapman v. Douglas County*, 107 U. S. 348, 27 L. Ed. 378, 2 Sup. Ct. Rep. 62; *City of Parkersburg v. Brown*, 106 U. S. 487, 27 L. Ed. 238, 1 Sup. Ct. Rep. 442; *North River Electric Light etc. Co. v. City of New York*, 48 App. Div. 14, 62 N. Y. Supp. 726; *Village of Harvey v. Wilson*, 78 Ill. App. 544; *Boyd v. Black School Tp.*, 123 Ind. 1, 23 N. E. 862.)

Messrs. Norris, Hurd & Smith, for Respondent, submitted a brief; *Mr. Edwin L. Norris* argued the cause orally.

At the common law no duty devolved upon the county, or a similar political subdivision of the state, for the care of the poor. (*Miller v. Somerset*, 14 Mass. 396; *Cooledge v. Mahaska County*, 24 Iowa, 211; *Wood v. Boone County*, 153 Iowa, 92, Ann. Cas. 1913D, 1070, 39 L. R. A. (n. s.) 168, 133 N. W. 377; *Lander County v. Humboldt County*, 21 Neb. 415, 32 Pac. 849; 30 Cyc. 1067.) Counties owe no other duties to the poor and incur no other liabilities for their support than are imposed by the statute, and before a county may be made liable for the care of such dependent poor, the case must fall strictly within the provisions of the statute (*Lebcher v. Board of Commrs.*, 9 Mont. 315, 23 Pac. 713), and the liability must have been created pursuant to and in the manner prescribed by the statute. (*Lander County v. Humboldt County*, *supra*; *Patrick v. Baldwin*, 109 Wis. 342, 53 L. R. A. 613, 85 N. W. 274; *Hamlin County v. Clark County*, 1 S. D. 131, 45 N. W. 329; *Board of Commrs. of Sweetwater County v. Board of Commrs. of Carbon County*, 6 Wyo. 254, 44 Pac. 66; *St. Luke's Hospital Assn. v. Grand Forks County*, 8 N. D. 241, 77 N. W. 598; *Board of Commrs. v. Phye*, 27 Colo. 107, 59 Pac. 55; *Hamilton County v. Meyers*, 23 Neb. 718, 37 N. W. 623; *Washoe County v. Eureka County*, 25 Nev. 356, 60 Pac. 376; *Mansfield v. Sac County*, 60 Iowa, 11, 14 N. W. 73.)

This contract was not merely defective or imperfect, but was absolutely void. If a body politic in the nature of a municipal corporation enters into a contract, "that the law does not empower them to enter into, there is no authority for such a contract; nothing for it to stand on, and it falls of its own weight. It is void." (*Lebcher v. Board of Commrs., supra; Missoula St. R. Co. v. City of Missoula*, 47 Mont. 85, 130 Pac. 771.) If the contract was void, the plaintiff could not recover thereon. The contract as such amounts to nothing and cannot avail the appellants herein. (*Lebcher v. Board of Commrs., supra; State ex rel. Lambert v. Coad*, 23 Mont. 131, 57 Pac. 1092; *Independent Pub. Co. v. Lewis and Clark County*, 30 Mont. 83, 75 Pac. 860; *State ex rel. Stuewe v. Hindson*, 44 Mont. 429, 120 Pac. 485; *Hersey v. Neilson*, 47 Mont. 132, Ann. Cas. 1914C, 963, 131 Pac. 30.)

The board of county commissioners may not allow a reasonable compensation on the basis of an implied promise. (*Sears v. Galatin County*, 20 Mont. 462, 40 L. R. A. 405, 52 Pac. 204; *Wade v. Lewis and Clark County*, 24 Mont. 335, 61 Pac. 879; *State ex rel. Lambert v. Coad, Independent Pub. Co. v. Lewis and Clarke County, supra.*) The case of *Missoula St. R. Co. v. City of Missoula*, 47 Mont. 85, 130 Pac. 771, seems determinative of this question.

Implied promises requiring a public corporation to restore benefits received by it or to pay compensation therefor have never been created in cases involving anything other than money or other property. To cases of that character there are many exceptions. The doctrine has no application to cases where only services are rendered. The claim in this case is for the reasonable services rendered. (*Argenti v. San Francisco*, 16 Cal. 255; *Hampton v. Board of Commrs.*, 4 Idaho, 646, 43 Pac. 324; *Wakefield v. Brophy*, 67 Misc. Rep. 298, 122 N. Y. Supp. 632; *McDonald v. Mayor etc. of New York*, 68 N. Y. 23, 23 Am. Rep. 144; *Edison Electric Co. v. Pasadena*, 178 Fed. 425, 102 C. C. A. 401.)

That no implied liability arises where the contract, though within the scope of the statute is violative of mandatory pro-

visions thereof, is well settled. (1 Elliott on Contracts, sec. 606; *Fountain v. Sacramento*, 1 Cal. App. 461, 82 Pac. 637; *Richardson v. Grant County*, 27 Fed. 495; *Peck-Williamson Heating etc. Co. v. Steen School Tp.*, 30 Ind. App. 637, 66 N. E. 909; *Harrison County v. Ogden*, 133 Iowa, 9, 110 N. W. 32; *Lovejoy v. Inhabitants of Foxcroft*, 91 Me. 367, 40 Atl. 141; *Detroit v. Michigan Paving Co.*, 36 Mich. 335; *Rumsey Mfg. Co. v. Town of Schell City*, 21 Mo. App. 175; *New Jersey Car etc. Co. v. Jersey City*, 14 N. J. L. 544, 46 Atl. 649; *Wellston v. Morgan*, 65 Ohio St. 219, 62 N. E. 127; *O'Rourke v. Philadelphia*, 211 Pa. 79, 60 Atl. 499; *McGillivray v. Joint School District*, 112 Wis. 354, 88 Am. St. Rep. 969, 58 L. R. A. 100, 88 N. W. 310.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

On December 6, 1910, C. C. Barnett, one of the appellants, submitted to the board of commissioners of Beaverhead county his bid for a contract for the care of the indigent sick, poor and infirm of the county. This was in response to a notice published by an order of the board in pursuance of section 2054 of the Revised Codes, as amended by the Laws of 1909 (Laws 1909, Chap. 29). On December 10 he was awarded a contract. Under its terms he assumed the obligation to care for and support the indigents whose maintenance was chargeable to the county as provided in the statute, except that he did not assume to furnish medical attendance and medical supplies, to pay the salaries of the nurses for the sick or the expense of the necessary laundry work. It was expressly agreed that he was relieved from any obligation in this behalf. The contract covered a term of three years from December 12, 1910. Barnett was to be paid by the county, at the quarterly meetings of the board, eighty cents per day for each person who became a county charge; he was to have the use of the county poor farm, and, as a consideration for its use, was to pay to the county in installments on specified dates, for the first year, \$1,900, for the second, \$2,000, and for the third, \$2,100 or a total of \$6,000 for the three

years. The contract recited with great particularity the obligations mutually assumed by the county and Barnett. For present purposes, the foregoing general statement of its nature and object will suffice. Appellants Eliel and Best became the sureties of Barnett for the faithful performance of the contract, and the latter proceeded to execute it on his part, receiving his compensation and paying the rent for the farm as therein provided. On August 29, 1913, the respondent brought his action in the district court against the board, alleging that the contract was void because the board had failed in several particulars to observe the requirements of the statute in the letting of it, and demanding that the board be enjoined from making further allowance or payment to Barnett for his services under it. It was alleged that the contract was void because: (1) The notice was not published for the time required by law before the contract was let; (2) because of the exceptions made therein, relieving Barnett from the necessity of furnishing medical attendance, medical supplies, *etc.*; (3) because it fixed the compensation at a rate per day instead of a rate per week, as required by the statute; and (4) because it covered a term not contemplated by the statute. On application to the court, it issued an injunction pending final decree. None of the appellants were parties to this action. The board suffered a default to be entered, and on February 2, 1914, after final hearing, the contract was adjudged void, and the board was peremptorily enjoined from proceeding under it, and specifically from paying any further compensation to Barnett. On December 1, 1913, Barnett presented to the board a verified account for allowance for the care of indigents during the months of June, July and August, at the rate *per capita* specified in the contract, amounting to \$1,518.30. On March 6, 1914, the board having allowed the account to the amount of \$1,430, directed the issuance to Barnett of a warrant for this amount, and this was at once done. Barnett immediately assigned the warrant to Eliel and Best, who thereupon assigned and delivered it to the board for the county in part payment of the rent due from Barnett for use

of the poor farm under the terms of the contract. Thereupon the respondent, as a taxpayer of the county, appealed to the district court from the order of allowance. On June 22, 1914, the controversy was submitted to the court upon an agreed statement of facts, to which the county, represented by the county attorney, the appellants, and the respondent were all parties. It was agreed, among other things, in addition to the foregoing recitals, that the persons cared for and maintained by Barnett were properly charges of the county; that it was the duty of the county to care for and maintain them; that Barnett performed the services rendered to the county in this behalf in good faith, in the belief that the contract was valid and binding upon him as well as the county; that the county received the benefit of his services and the supplies furnished by him in good faith; that the county had paid no consideration for the services and the supplies so furnished; and that the sum allowed by the board was the reasonable value thereof. Upon the facts submitted, the court held that the claim had been allowed and the warrant issued without authority of law, and that the county was entitled to recover from the appellants the amounts specified in the warrant. Judgment was rendered accordingly. The appeal is from an order denying appellants' motion for a new trial.

Whether the Barnett contract was void upon any of the grounds alleged in the action brought by the respondent, and whether Barnett was concluded by the decree therein, are questions which do not arise on this appeal. When the action was brought and a temporary injunction was issued, Barnett abandoned further performance of the contract, assuming, apparently, that he could not lawfully proceed under it. In any event, in presenting this case, counsel for appellants have assumed that the decree in that case was proper and binding upon the county, and also concluded Barnett for all purposes. They assail the integrity of the judgment in this case on several grounds. One of them is that, though the contract was void, yet since under the provisions of the Code on the subject it

was the absolute duty of the county to provide for the care and maintenance of indigents in the county, and Barnett, at the instance of the board, performed services and incurred expense in that behalf, he is entitled to reasonable compensation for his services and to be reimbursed for his expenses. It is also contended that, upon the broad principle of equity and good conscience, the county, having received the benefit of Barnett's services and outlay, ought to reimburse him. It is further contended that, whether Barnett is entitled to be reimbursed by the county or not, the court was without jurisdiction in this proceeding to render judgment against the appellants for the amount of the warrant issued in payment of Barnett's claim.

It may be remarked here that the result of the transaction between the board and the appellants was not a withdrawal of funds from the treasury of the county, but merely a discharge *pro tanto* by the board of the rent assumed to be due the county for Barnett's use of the poor farm up to the time respondent brought his action to annul the contract. From this point of view Barnett had not received money from the county for which recovery could be had upon any theory. Counsel and the court, however, both seem to have assumed that the transaction was the equivalent of a payment to Barnett and to have tried the issue whether or not the payment was legal, the court having plenary jurisdiction for all purposes. However this may have been, and without regard to the merits of the other contentions of counsel, we think the court was wholly without jurisdiction to render the judgment it did.

The proceeding was before the court on appeal from the order [1] of allowance by the board, in pursuance of these provisions of the Revised Codes:

"Sec. 2947. Whenever a claim against a county is disallowed in whole or in part, or when any taxpayer of the county is not satisfied with any allowance made by the board, the claimant or such taxpayer may appeal from the decision of the board to the district court for the county, by causing a written notice of appeal to be served on the clerk of the board, within thirty

days after the making of the decision or allowance, and executing a bond to the county, with surety to be approved by the clerk of the board, conditioned to prosecute such appeal to effect, and to pay all costs that may be adjudged against the appellant.

“Sec. 2948. The clerk of the board, upon an appeal being taken, must immediately give notice thereof to the county attorney, and must make out a return of the proceedings in the matter before the board, with its decision thereon, and file the same, together with the bond and all the papers therein in his possession, with the clerk of the district court; and such appeal must be entered, tried and determined, the same as appeals from justices’ courts, and costs are awarded in like manner.”

These provisions contemplate that the parties to the controversy in the district court in such cases are the county and the claimant or the taxpayer. Clearly, this is so when the claimant is the appellant, for the controversy is between him and the county upon the question of allowance or disallowance, or, in other words, upon the question whether he has a legal claim against the county. The same situation is presented when a taxpayer is the appellant because there is no provision for notice to the claimant; the only provision on the subject being the requirement that the clerk shall give notice to the county attorney, the representative of the county. It will be noted, too, that the appeal bond required of the taxpayer runs, not to the claimant, but to the county, and there is no provision that if the taxpayer is overruled, the claimant may recover his costs against the taxpayer or the county; nor, if the taxpayer is successful in reversing the order, that the county may have judgment against the claimant for its costs.

The scope and meaning of these sections have never been defined by this court, nor has any decision construing them been called to our attention. They were considered somewhat in *State ex rel. Cope v. Minar*, 13 Mont. 1, 31 Pac. 723, but the Justices were not in harmony, except upon the point that the judgment which had been rendered by the district court on appeal by a taxpayer from an order of allowance by the board

of commissioners was void for want of jurisdiction. In a concurring opinion in that case Mr. Justice Harwood expressed the view that when a taxpayer appeals, the real adversary party is the claimant, and that the clear implication is that he must be made a party under the general provision of the statute (Rev. Codes, sec. 6498), authorizing the court, whenever the presence of other parties than those before it is necessary to a complete determination of the controversy in hand, to order them to be brought in. This proceeding, however, is a special statutory proceeding, and in conducting and determining it, the court [2] must look to the statute for its authority. As in cases of appeals from justices' courts, the district court is limited to a determination of only such matters as the justice might have determined (*Duane v. Molinak*, 31 Mont. 343, 78 Pac. 588, and cases cited), so here the court is limited in its authority to the determination of only the matter that was before the board of commissioners. The language of the last clause of section 2948 can mean no more than that the court may try *de novo* the question whether the action of the board in its allowance or disallowance was correct, and so declare. The board is not a court, and its action is not tantamount to a judgment. Its refusal to allow a claim is not conclusive even though the claimant does not appeal. (Rev. Codes, sec. 6450a; *Greeley v. Cascade County*, 22 Mont. 580, 57 Pac. 274.) So the action of the district court does not terminate in a formal judgment for the amount of the claim, but only in an order affirming or reversing the action of the board. In other words, for the time it sits in place of the board and performs the functions of the board, being authorized to render no judgment other than one for costs. This is apparently the limit of its power. This was the view entertained by Mr. Chief Justice Blake in *State ex rel. Cope v. Minar*, *supra*. We think it clearly correct.

But let it be conceded that the adversary parties are the claimant and the taxpayer, the county being only the pawnholder, and that the determination of the district court is conclusive upon the question of allowance or disallowance. The

[3] statute does not authorize the court to grant any other relief. It does not directly or by implication authorize judgment against the claimant for the amount of a claim already paid to him. Since the statute is the limit of the court's power, the judgment in this case cannot be upheld.

The order is therefore reversed, and the district court is directed to grant the appellants a new trial.

Reversed and remanded.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

WALL, ADMINISTRATOR, RESPONDENT, v. NORTHERN PACIFIC
RY. CO., APPELLANT.

(No. 3,439.)

(Submitted September 27, 1916. Decided December 1, 1916.)

[161 Pac. 518.]

[On Remand from Supreme Court of United States.]

[For original opinion, see 50 Mont. 122, 145 Pac. 291.]

Common Carriers—Livestock—Transportation—Interstate Commerce—Bills of Lading—Waiver—Appeal and Error—Theory of Case—Federal Question—General Verdict—Conclusiveness.

Interstate Commerce—Bills of Lading—Waiver.

1. A carrier engaged in interstate commerce cannot, under the Interstate Commerce Act, waive compliance with the requirement in a bill of lading making it incumbent on the shipper of cattle, as a condition precedent to his right to recover damages for injury to them while in transit, to give notice in writing of his claim before they are removed from the place of destination or mingled with other stock.

Appeal and Error—Theory of Case—Federal Question.

2. The rule of practice that parties cannot on appeal change the theory on which the cause was tried in the lower court must give way where the theory entertained by court and parties on the trial of the cause had to do with a federal question theretofore adversely decided by the supreme court of the United States.

[As to jurisdiction of action for damages for violation of Interstate Commerce Act, see note in Ann. Cas. 1912A, 613.]

Same—General Verdict—Conclusiveness.

3. Where an action against a railroad for injury to cattle while in transit was based on three different items of damage, and it is impossible to determine from the record what particular items were considered by the jury in returning a verdict in a lump sum, the supreme court cannot direct judgment awarding damages for any one of the items, and thus substitute its findings for those of the jury.

Messrs. Gunn, Rasch & Hall and *Messrs. Hartman & Hartman*, for Appellant, submitted a brief; *Mr. E. M. Hall* argued the cause orally.

Mr. Walter Aitken, for Respondent, submitted a brief and argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

When this cause came before this court on appeal from the district court of Gallatin county, we reached the conclusion that the provision in the bill of lading which required the shipper, as a condition precedent to his right to recover damages for any injury to the cattle while in transit, to give notice in writing of his claim before the cattle were removed from the place of destination or mingled with other stock, was unreasonable and void, and affirmed the judgment in favor of the plaintiff. (*Wall v. Northern Pac. Ry. Co.*, 50 Mont. 122, 145 Pac. 291.) The [1] question whether the carrier had waived compliance with that provision was submitted to the jury in the trial court, and the verdict was apparently based upon a finding that such compliance had been waived. In this court we deemed the question of waiver immaterial and gave it no consideration. When the cause was removed by writ of error to the supreme court of the United States, that court reversed our judgment and held, in effect, that the provision in the bill of lading to which reference has been made was reasonable and valid, and remanded the cause for further proceedings. (*Northern Pac. Ry. Co. v. Wall*, 241 U. S. 87, 60 L. Ed. 905, 36 Sup. Ct. Rep. 493.) Reference is made in the opinion to the fact that the question of waiver was litigated in the trial court, but not considered in this court. Counsel for plaintiff now insists that this court review the evi-

dence touching the question of waiver, and, if we find it sufficient to justify the verdict, that we again affirm the judgment, and argues that this was the intention of the supreme court of the United States in remanding the cause, with the directions contained in the mandate. We are met with the contention by counsel for the carrier that such could not have been the intention of the supreme court, for the reason that compliance with the provision of the bill of lading in question could not be waived by the carrier, and that the supreme court had theretofore and has since held that compliance with like terms of contracts of interstate shipments cannot be waived.

In many instances the supreme court has had occasion to consider the Commerce Act and its amendments, generally with reference to deviations from the established rates, and to indicate the broad purpose to be served by that legislation.

In *New York, New Haven & H. R. Co. v. Interstate Commerce Comm.*, 200 U. S. 361, 50 L. Ed. 515, 26 Sup. Ct. Rep. 272, that court said: "It cannot be challenged that the great purpose of the Act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination. * * * If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer. What was that purpose? It was to compel the carrier as a public agent to give equal treatment to all."

In *Armour Packing Co. v. United States*, 209 U. S. 56, 52 L. Ed. 681, 28 Sup. Ct. Rep. 428, the court said: "The Elkins Act proceeded upon broad lines, and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service under the same conditions should be the one established, published and posted as required by law. It is not so much the particular form by which or the motive for

which this purpose was accomplished, but the intention was to prohibit any and all means that might be resorted to to obtain or receive concessions and rebates from the fixed rates, duly posted and published."

In *Chicago & Alton R. R. Co. v. Kirby*, 225 U. S. 155, Ann. Cas. 1914A, 501, 56 L. Ed. 1033, 32 Sup. Ct. Rep. 648, where the shipper was relying upon a special oral contract that his stock should be taken by a particular fast train, the court quoted with approval the excerpt from the opinion in the *Armour Case* above, as justification for its conclusion that such a special contract was invalid, and further said: "The broad purpose of the Commerce Act was to compel the establishment of reasonable rates and their uniform application. That purpose would be defeated if sanction be given to a special contract by which any such advantage is given to a particular shipper as that contracted for by the defendant in error. To guarantee a particular connection and transportation by a particular train was to give an advantage or preference not open to all and not provided for in the published tariffs."

In a somewhat similar case, *Kansas City Southern Ry. Co. v. Carl*, 227 U. S. 639, 57 L. Ed. 683, 33 Sup. Ct. Rep. 391, the court said: "Nor can a carrier legally contract with a particular shipper for an unusual service, unless he make and publish a rate for such service equally open to all."

Another case, very similar in its facts to the *Kirby Case* above, is *Atchison, T. & S. F. Ry. Co. v. Robinson*, 233 U. S. 173, 58 L. Ed. 901, 34 Sup. Ct. Rep. 556. There the court said: "If oral agreements of this character can be sustained, then the door is open to all manner of special contracts, departing from the schedules and rates filed with the commission. (*Kansas City Southern Ry. Co. v. Carl*, 227 U. S. 639, 652 [33 Sup. Ct. Rep. 391, 57 L. Ed. 683].) To maintain the supremacy of such oral agreements would defeat the primary purposes of the Interstate Commerce Act, so often affirmed in the decisions of this court, which are to require equal treatment of all shippers and

the charging of but one rate to all, and that the one filed as required by the Act.”

In *Phillips Co. v. Grand Trunk W. R. Co.*, 236 U. S. 662, 59 L. Ed. 774, 35 Sup. Ct. Rep. 444, there was presented the question whether, in an action by a shipper to recover for freight overcharges, where it appeared from the face of the complaint that the action had not been commenced within the time limited by the Hepburn Amendment, the objection could be raised by general demurrer. The court held that under the statute the lapse of time not only bars the remedy, but destroys the liability, and said: “This will more distinctly appear by considering the requirements of uniformity, which, in this as in so many other instances, must be borne in mind in construing the Commerce Act. The obligation of the carrier to adhere to the legal rate, to refund only what is permitted by law and to treat all shippers alike, would have made it illegal for the carriers, either *by silence or by express waiver*, to preserve to the Phillips Company a right of action which the statute required should be asserted within a fixed period. To have one period of limitation where the complaint is filed before the Commission and the varying periods of limitation of the different states, where a suit was brought in a court of competent jurisdiction; or to permit a railroad company to plead the statute of limitations as against some and to waive it as against others, would be to prefer some and discriminate against others in violation of the terms of the Commerce Act, which forbids all devices by which such results may be accomplished. The prohibitions of the statute against unjust discrimination relate, not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments or the waiver of defenses open to the carrier. The railroad company, therefore, was bound to claim the benefit of the statute here, and could do so here by general demurrer.”

In *Georgia, F. & A. Ry. Co. v. Blish Milling Co.*, 241 U. S. 190, 60 L. Ed. 948, 36 Sup. Ct. Rep. 541, there was presented the question whether by its wrongful act the carrier could abandon

the contract of shipment and render itself liable in the event the shipper had failed to make claim within the time limited for such purpose by the bill of lading. The court said: "It is urged, however, that the carrier, in making the misdelivery, converted the flour and thus abandoned the contract. But the parties could not waive the terms of the contract under which the shipment was made pursuant to the federal Act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the Act and open the door to the very abuses at which the Act was aimed."

In *Banaka v. Missouri Pac. Ry. Co.*, 193 Mo. App. 345, 186 S. W. 7, the court of appeals of Missouri had under consideration the question whether an interstate carrier can waive the requirement in the bill of lading that notice of claim for damages must be presented within a certain specified time, and said: "But plaintiff relies upon a waiver of the notice by conduct. That is to say, defendant by its acts and conduct waived its privileges with respect to notice in this: That it accepted and received plaintiff's claim without protest or complaint, after the limitation of four months had expired, and that it treated with plaintiff since four months after a reasonable time for delivery had expired, and declined to pay on other grounds than want of notice. The federal Commerce Act is designed to prevent discrimination between shippers, and its object is to nullify any device whereby the carrier may practice favoritism between them." The court refers to the language employed in the *Phillips Case* above, and concludes: "Under this rule of equality we think a carrier cannot say to one shipper, 'I will enforce the burdensome terms of our contract requiring notice in a specified time,' and to another, 'I will release you from the same provisions in the same character of contract.' We do not say that a situation might not exist whereby a shipper would be relieved of the necessity of

giving notice of loss, but we do say that a carrier may not, by his voluntary act, release one and hold the other." The same conclusion was reached by the same court in *Kemper Mill Co. v. Missouri Pac. Ry. Co.*, 193 Mo. App. 466, 186 S. W. 8. There reference is made to the decision in the *Blish Milling Co. Case* above, and it is said that the supreme court of the United States there held that the giving of the notice by the shipper cannot be waived by the carrier. Again, in *Donoho v. Missouri Pac. Ry. Co.*, 193 Mo. App. 610, 187 S. W. 141, the same court held: "Under the decisions of the supreme court of the United States, the contractual provision as to notice is valid, and it cannot be waived."

When we realize that the ultimate object of the Commerce Act is to guarantee to interstate shippers absolute equality in rates and treatment, and to prevent unjust discriminations, by whatever means employed, the conclusion is forced that the carrier cannot waive a provision of the bill of lading of the character of the one under consideration. To permit the carrier to say to one of two competing shippers, "If you do not present a notice of your claim for damages within the time limited by the bill of lading, your right to sue shall be forfeited," and to another shipper, under similar circumstances, "Notwithstanding your failure to give the required notice, your right to press the claim by negotiations, or in court, will not be disputed, and no question will be raised upon your failure to give notice," would result in substituting for the written contract of shipment what is in effect a special agreement, not filed with nor sanctioned by the Interstate Commerce Commission, and one whereby the latter shipper would secure a decided preference and advantage over his less fortunate competitor. It was plainly the intention of Congress that the shipping contracts shall be such only as meet the approval of the Commission; that they shall be published for the benefit of all intending shippers alike; that they shall be rigidly adhered to by both shipper and carrier, and all the terms and provisions carried into effect in good faith. If the carrier

cannot waive the defense that the action against it was not commenced within the time limited by statute, as held in the *Phillips Case* above, neither can it waive the defense that the required notice was not presented in time.

It is suggested by counsel for the plaintiff that this cause [2] was tried and determined in the court below upon the theory that compliance with the provision of the shipping contract requiring notice could be waived, and that the railway company ought not to be permitted to change its theory at this late day. But whether such compliance can be waived is a federal question, and in our opinion our rule of practice to which reference is made must give way in this instance to the holding of the supreme court of the United States.

Since the required notice was not given in this instance, and the failure to give it could not be waived by the carrier, but must be invoked, there is, under the decision of the supreme court of the United States, no question open for further consideration.

Plaintiff urges that he may recover for the three animals [3] which died en route, even if he is denied relief for the injuries to the others. The action was brought to recover \$1,504.83 as the aggregate damages for the loss of these three, for the injuries and depreciation to the others, and for the extra feed and care. The jury returned a general verdict in favor of plaintiff for \$879.60, and we are unable to say from the record what particular elements were considered in making up that amount. Whether the jury found that these three animals died from exposure to the extreme cold, from being trampled by the others, or that the deaths resulted proximately from defendant's negligence in unreasonably delaying the shipment, cannot be determined. We cannot substitute this court for the jury and make findings upon those subjects.

The judgment heretofore rendered by this court is vacated and set aside, and it is now ordered that the judgment of the district court of Gallatin county in favor of the plaintiff, and

the order denying defendant's motion for a new trial, be reversed, and the cause is remanded, with directions to the lower court to enter judgment in favor of the defendant for its costs, including the costs incurred in the supreme court of the United States.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

CASES DETERMINED
IN THE
SUPREME COURT

AT THE
DECEMBER TERM, 1916.

THE HON. THEODORE BRANTLY, Chief Justice.

THE HON. SYDNEY SANNER,
THE HON. WILLIAM L. HOLLOWAY, } **Associate Justices.**

REA ET AL., APPELLANTS, v. ALFALFA PRODUCTS CO.
ET AL., RESPONDENTS.

(No. 3,706.)

(Submitted September 23, 1916. Decided December 7, 1916.)

[161 Pac. 708.]

Contracts—Breach—Evidence—Rebuttal—Proper Rejection—
Trial—Instructions—Technical Error—Effect.

Appeal—Evidence—Admissibility—Technical Error.

1. Technical error in the reception of evidence as to facts admitted does not command a reversal.

Contracts—Breach—Agency—Evidence—Admissibility.

2. In an action for breach of a contract for the feeding of sheep, admission of evidence that defendants had impressed upon plaintiffs' agent in charge of the sheep that payment of feeding charges would have to be made monthly as required by the contract, was not reversible error.

Appeal and Error—Rebuttal—Evidence—Proper Rejection.

3. Rejection of testimony in rebuttal was not error where there was nothing to rebut.

Same—Trial—Evidence—Comment upon, by Court.

4. The rule forbidding trial judges from commenting on the evidence during trial does not apply where counsel, to whom the judge remarked that the facts he was incorporating in a question to a

witness were not as he stated them, was assuming a state of facts not warranted by the evidence.

[As to what is deemed to be invasion by the court of the province of the jury, see note in 14 Am. St. Rep. 36.]

Trial—Instructions—Immaterial Modification.

5. In an action for breach of a contract to feed sheep, where plaintiff alleged defendant's delay in constructing yards and corrals, the substitution of "reasonable" for "reasonably short" in an instruction, with reference to the time in which the construction should be completed, was not error.

Same—Offered Instruction—Proper Refusal.

6. An offered instruction based on facts not shown by the evidence was properly refused.

Contracts—Breach—"Cancellation" — Instructions — Technical Error — Effect.

7. Where the question of the cancellation of a contract was not involved in an action for damages for its breach, the technical misuse of the term "cancellation" in an instruction was not sufficient to reverse the judgment where from the charge as a whole the jury must have understood that the term was used in the sense that defendants were not bound to continue after plaintiffs breached the contract by an unjustifiable failure to pay a previous monthly bill.

Appeal from District Court, Yellowstone County; Geo. W. Pierson, Judge.

ACTION by James Rea and William Rea, Jr., copartners doing business as Rea Bros., against the Alfalfa Products Company, a corporation, and another. From a judgment for defendants, and an order denying a new trial, plaintiffs appeal. Affirmed.

Mr. F. B. Reynolds, for Appellants, submitted a brief and argued the cause orally.

Messrs. Grimstad, Brown & Manning, for Respondents, submitted a brief; *Mr. O. K. Grimstad* argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

Action to establish a claim for damages for breach of contract. The substance of the complaint is: That prior to November 1, 1913, the plaintiffs entered into a written contract with the defendant Alfalfa Products Company (now bankrupt), whereby the latter agreed that it would on or about said date complete yards and corrals at Big Timber so as to take for feeding, and would take and there feed upon its special product

“mollasafal,” certain of plaintiffs’ sheep until the same should be ready for market, at a stipulated price per ton for feed furnished; that pursuant to said contract plaintiffs shipped to Big Timber 8,652 sheep, but the company did not have its yards completed or take said sheep for feeding until December 11, 1913, and did not thereafter furnish for said sheep more than one-half enough feed—in consequence of which plaintiffs were obliged to do with feed of inferior quality or inferior quantity, and were finally compelled on January 14, 1914, to sell the sheep at a price at least \$1 per head less than they would have been worth, had the contract been performed. The damages are laid in gross at \$8,652.

In addition to the general issue, the answer presents: That after said contract was entered into, and prior to November 1, 1913, the plaintiffs waived the reception of said sheep on that date, and granted to the defendant company an extension for the completion of its yards and corrals until such time as it could procure the necessary materials, delayed without its fault; that pursuant to such extension, the plaintiffs made arrangements satisfactory to them for the pasturage of their sheep near Big Timber in the meantime, and shipped said sheep to Big Timber on November 8, 1913, for such pasturage; that the sheep were taken by the defendant company on December 4, 1913, and were fed and cared for until January 14, 1914; that although the contract called for payment on the first day of each calendar month for all feed furnished during the month preceding, the plaintiffs failed on January 1, 1914, or thereafter, to pay for the feed furnished in December, 1913, and have also failed and refused to pay for any of the feed furnished to their sheep by the company.

The affirmative allegations of the answer were denied by the reply, and the cause was brought to trial before a jury whose verdict was for the defendants. Judgment followed accordingly, and from this, as also from an order afterward made denying their motion for a new trial, the plaintiffs have appealed.

The verdict is confessedly justified by the evidence, but a reversal is sought for error in respect of the following:

I. Rulings admitting evidence to the effect that while the plaintiffs' sheep were being fed by the defendant company, [1] sheep belonging to one Arnold and some lambs belonging to Glenn Parker were also being fed by the defendant company on molasafal, and did well. As to Arnold's sheep, it was made to appear that they had been fed and handled substantially the same as the plaintiffs' sheep, so that there was a sufficient showing of parity in conditions to authorize the evidence even if it tended to prove that plaintiffs' sheep were sufficiently fed. The true effect of the evidence, however, as to both the Arnold sheep and the Parker lambs was merely to confirm what the parties themselves had admitted, viz., that molasafal was a satisfactory food; and while it is technical error to receive evidence of facts admitted, such error does not command a reversal. (Rev. Codes, sec. 6593.)

II. Rulings permitting the defendants to show that after January 1, 1914, they had impressed upon Mr. Petrie, the man [2] in charge of plaintiffs' sheep, that they could not buy the syrup necessary to make up the feed without money, and the bill for the December feed would have to be paid. We see neither harm nor error in this. That the company might need or want its money and might not feel obliged to go on indefinitely without it was a fact of which the plaintiffs could take notice without any communication, in view of the contract itself. Moreover, Petrie was not merely an employee of plaintiffs charged with the physical direction of the sheep; he was the plaintiffs' agent to speak, and, if necessary, to give directions or to complain for them relative to the feeding, and, of necessity, to receive for and convey to them such information as the defendant company had to give concerning such feeding or concerning any reasons which might exist for the stoppage thereof.

III. Rulings rejecting evidence touching the weight of the [3] sheep when received, offered in rebuttal. The plaintiffs had presented testimony in their case in chief giving the average

weight of all the sheep; so, likewise, had the defendants in their case, and the question was for the jury. The evidence offered in rebuttal was intended to show that only the light end of the sheep had been weighed, and thus by inference to contradict the testimony as previously given on both sides. There was no claim of mistake to be rectified, and we think under the circumstances the rulings were proper.

IV. Rulings rejecting testimony offered in rebuttal, to the effect that the sheep were not sold or shipped pursuant to the demands of the mortgagee thereof. While it was alleged in the answer that the sheep were sold or shipped pursuant to the demands of the mortgagee and not because of any failure of defendants, there was no proof to support this allegation, and therefore nothing to rebut by the evidence offered.

V. The remarks of the court addressed to counsel while sustaining an objection. Counsel for plaintiffs in asking a question [4] about a certain alleged conversation, had assumed a state of facts as applicable to the conversation he had in mind, which pertained to another and different one, and the court remarked, "That wasn't the testimony, Judge Reynolds." In what tone or with what manner this was said we do not know, but the words were justified. The supposed rule forbidding trial judges from commenting on the evidence has no application to a situation like this. It is the duty of the court to see that witnesses are not misled and that the evidence is not misapplied, and this action of the court, so far as it is disclosed by the record, meets our approval.

VI. Rulings on Instructions:

(a) The modifications of plaintiffs' offered instruction No. 4 [5] were not objectionable. The substitution of "reasonable" for "reasonably short," as applied to the time after November 1, 1913, within which the company should by the contract have completed its yards, worked no essential change, while the interpolation of the clause relating to the waiver was a laudable attempt to state the whole law applicable to the delay feature without needless and confusing repetition.

(b) On the facts presented by this record, offered instruction No. 5 was misleading and properly refused. The essence of it, so far as proper, was sufficiently stated elsewhere in the charge.

(c) Plaintiffs' offered instruction No. 7 was intended to advise the jury touching plaintiffs' claim to an offset on January 1, 1914; but it is predicated on two mistakes of fact, viz.: The assumption that there was evidence to warrant the inference of damages to plaintiffs' sheep at that time greater in amount than the feed bill, and that there was a balance due from the company to the plaintiffs for feed furnished in December. The court was therefore under no obligation to give the instruction as offered, even though the reason assigned for such refusal may not have been tenable.

(d) Plaintiffs assail instruction No. 7 as given to the jury, because of a technical misuse and misapplication of the term "cancellation," cancellation not being involved in the case. Granting this, we are at a loss to see how the plaintiffs could have suffered any injury from the instruction, since its obvious meaning, taken in connection with the rest of the charge, is that if the plaintiffs by an unjustifiable refusal to pay for the December feed had breached the contract, the defendant company was under no necessity to go on with it.

The judgment and order appealed from are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

STATE, RESPONDENT, v. BRADSHAW, APPELLANT.

(No. 3,848.)

(Submitted September 21, 1916. Decided December 8, 1916.)

[161 Pac. 710.]

*Criminal Law—Resisting Officer—Arrest Without Warrant—
Duty and Power of Officer—Burden of Proof—Public Lands—
Livestock—Driving from Range—Statutes—Construction.*

Criminal Law—Arrest on Warrant—Peace Officers—Powers.

1. The person named in a warrant of arrest must submit even though not guilty of any offense, and the officer, after making his purpose known and exhibiting the warrant if requested to do so, may use such force as is necessary to effect the arrest, without subjecting himself to a charge of trespass.

Same—Arrest Without Warrant—Power of Officer.

2. A peace officer can make an arrest without a warrant only under the circumstances specified in section 9057, Revised Codes.

Same—Arrest Without Warrant—When Resistance not Crime.

3. Where an officer attempts to make an arrest without a warrant, under circumstances other than those enumerated in section 9057, Revised Codes, the person sought to be arrested may use such force as may be necessary to prevent the arrest, or to effect his escape after arrest.

[As to what constitutes offense of resisting officer, see note in Ann. Cas. 1914B, 813.]

Same—Arrest Without Warrant—Resisting Officer—Burden of Proof.

4. In a prosecution for resisting an officer attempting to make an arrest without a warrant, the existence of anyone of the emergencies pointed out by section 9057, Revised Codes, justifying the arrest, must be clearly established; proof of a mere belief in its existence, though entertained in the utmost good faith, being insufficient.

Same—Arrest Without Warrant—Duty of Officer.

5. An officer about to make an arrest without a warrant must make known his official character if unknown to the offender, else the latter need not submit.

Same—Livestock—Driving from Range—Statutes.

6. *Held*, that section 8858, Revised Codes, and not section 8860—both of which make unlawful the driving of livestock from their accustomed range—declares the law upon the subject.

Public Lands—Use—Policy of Federal Government.

7. It is the policy of the federal government that the open, unoccupied public lands shall be free to all persons who desire to use them for grazing purposes; hence no one can lawfully exercise exclusive control over, and thus monopolize the use of, them.

Same—Acquisition—Use by Others—Livestock—Driving from Range.

8. Until the person who acquires title to public lands chooses to make exclusive use of them, either by erecting lawful fences or by keeping animals running at large driven beyond his boundaries, they may be used for grazing purposes by others; if he chooses to

exercise his right by driving them away, he is not required to drive them to any particular portion of their accustomed range, driving them beyond his boundaries being sufficient.

Criminal Law—Arrest Without Warrant—Resisting Officer—Insufficient Evidence.

9. *Held* that inasmuch as defendant, charged with resisting a deputy sheriff in an attempted arrest, without a warrant, for unlawfully driving cattle from their accustomed range, committed no wrong in driving the cattle from portions of the public domain acquired by him and leaving them on the range in the vicinity of lands belonging to their owner, he was not, under section 9057, *supra*, subject to arrest without a warrant, and therefore not guilty of any offense in resisting arrest.

Appeal from District Court, Custer County; Daniel L. O'Hern, Judge.

W. J. BRADSHAW was convicted of the crime of resisting an officer while the latter was in discharge of his duties, and, from the judgment and order denying new trial, he appeals. Reversed and remanded.

Cause submitted on brief of counsel for Appellant.

Messrs. Sharpless Walker and W. C. Packer, for Appellant.

No appearance on behalf of Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The defendant, having been charged with the crime of resisting a public officer while the latter was in the discharge of his duty in attempting to arrest the defendant, was convicted and sentenced to undergo imprisonment in the county jail and to pay a fine. He has appealed from the judgment and an order denying his motion for a new trial. He assails the validity of the conviction on the grounds that the information does not state a public offense, that the court erred to his prejudice in its rulings upon questions of evidence and in its instructions to the jury, and that the verdict is contrary to the evidence. We shall notice only the contention which questions the sufficiency of the evidence, because in our opinion a conviction could not be

sustained upon the evidence found in the record, nor upon that supplemented by any other which might be introduced on another trial.

The charge in the information is that the defendant did "willfully, unlawfully, and knowingly resist, delay, and obstruct a public officer named Delos McBride, * * * a duly qualified and acting deputy sheriff, who was then and there in the discharge and attempting to discharge his duty as such deputy sheriff, being then and there engaged in making an arrest of said W. J. Bradshaw for a misdemeanor committed then and there in the presence of said deputy sheriff, to-wit, unlawfully driving cattle from their accustomed range," etc. McBride attempted to make the arrest without a warrant.

The statute authorizes a peace officer to make an arrest without a warrant under the circumstances indicated in section 9057 of the Revised Codes; among others, "for a public offense committed or attempted in his presence." Speaking generally, if [1] such an officer has in his hands a warrant fair on its face, issued by a competent court, commanding him to arrest a person named therein, his warrant is his authority, and the person named in it must submit to arrest even though he is not guilty of any offense. The officer, after making his purpose known and exhibiting his warrant, if required to do so, may use force in order to effect the arrest, without subjecting himself to a charge of trespass, provided he uses only such force as is necessary (Rev. Codes, secs. 9062-9064; *Sandford v. Nichols*, 13 Mass. 286, 7 Am. Dec. 151; *Appling v. State*, 95 Ark. 185, 28 [2, 3] L. R. A. (n. s.) 548, 128 S. W. 866). His right to arrest without a warrant, however, is vested in him by law, only under the circumstances defined in section 9057, and if the circumstances do not exist, thus bringing into activity the authority of the law, he has no power to make the arrest. His effort to do so is a trespass upon the right of the citizen to the enjoyment of his personal liberty free from aggression by anyone. In such case the person sought to be arrested may use such force as may be necessary to prevent the arrest, or to effect his escape

after arrest. (*Miers v. State*, 34 Tex. Cr. Rep. 161, 53 Am. St. Rep. 705, 29 S. W. 1074.) True, the offense for which the [4] arrest is sought may be in the form of resistance or obstruction offered to the officer in an attempt to arrest the defendant or another, or to discharge some duty under civil process (Rev. Codes, sec. 8259); but the power to make it must be brought into activity by the actual existence of the emergency pointed out by the law; and upon a prosecution for the offense of resisting an officer, this fact must be established by the same quantum of proof as is required to establish any material fact in any other criminal case. It is not sufficient that the officer believed that the defendant was engaged in a violation of the law, though such belief may have been entertained in the utmost good faith. Such was the rule at common law, and such is the rule under the statute. (1 Wharton's Criminal Law, 11th ed., sec. 136; *Sanders v. Davis*, 153 Ala. 375, 44 South. 979; *Cummins v. State*, 6 Okl. Cr. 180, 117 Pac. 1099.) The officer must [5] also make known his official character, or it must be known to the offender; else there is no obligation upon the latter to submit. (2 Wharton's Criminal Law, 11th ed., sec. 852; *Jones v. State*, 114 Ga. 73, 39 S. E. 861; *Yates v. People*, 32 N. Y. 509.)

There is some conflict in the evidence as to whether the defendant was informed of the purpose of the deputy, or presumptively knew of his character and purpose, and also upon the point whether the deputy made a *bona fide* attempt to effect defendant's arrest, or went further than to say to him that he was under arrest. It shows without contradiction, however, that the defendant was not engaged in committing any offense, or attempting to commit any.

[6] Section 8858 of the Revised Codes declares: "That any person or persons other than the owner of, or his agents who shall drive any horses, mules or cattle farther from their usual and customary ranges, than the nearest corral, and who shall neglect to return such horses, mules or cattle immediately to their accustomed range, provided they can have the use of such corral shall be deemed guilty of a misdemeanor, and on con-

viction thereof before any justice of the peace, in the state of Montana shall be fined in any sum not exceeding one hundred dollars nor less than twenty-five dollars, to be collected as other fines are, and may also in the discretion of the said justice of the peace be imprisoned in the county jail for a term not more than three months, or both. All fines collected under the provisions of this Act shall be paid into the school fund of the county in which the said stock do most usually range and graze.” This provision is the only one in the Codes now in force upon the subject, though the district court and the county attorney both entertained the view that the defendant, by his conduct at the time of his alleged resistance to the officer, was acting in violation of section 8860. The trial court proceeded upon this theory, but that this was erroneous will be made clear by a brief reference to the history of these two provisions. Section 8860 was a part of the Penal Code of 1895, as reported by the Code Commission appointed under the act of March 14, 1889 (Laws 1889, p. 116), and the amendment thereto by the act of March 6, 1891 (Laws 1891, p. 278). It is found in the Penal Code of 1895 as section 1187. When the Codes of 1895 were adopted, the legislature, by an act commonly known as the Omnibus Bill, found in Part V, Title IV, of the Political Code of 1895, and appearing in the Revised Codes as sections 3560–3566, continued in force many of the laws of 1893, among them an act approved March 6, 1893, which is found in the Codes of 1895 as section 1185 (sec. 8858, *supra*). It is declared by one of the provisions of the Omnibus Bill (Pol. Code 1895, sec. 5184 [Rev. Codes, sec. 3564]) that: “If any of the acts or parts of acts herein enumerated are in conflict with, or are inconsistent with, any of the provisions of the said Codes enumerated in section 3563 [Rev. Codes, sec. 5183] of this act, or any of them, the acts or parts of acts herein enumerated are to be considered and construed as amendments to the respective Code or Codes, whose provisions they are in conflict with, or are inconsistent with, it being intended hereby that all of the acts or parts of acts herein enumerated shall be the law of the state of Montana,

upon the respective subjects, so far as they are inconsistent with the provisions of the said Codes, or any of them, except as herein provided." Upon a comparison of the two provisions it becomes apparent, not only that section 8858 is in conflict with section 8860, but so much so that the conclusion is necessary that by the retention of the former the legislature must have intended to supplant entirely the latter. The latter declares that any willful driving of any of the animals enumerated from their customary range without the consent of the owner is a misdemeanor; whereas, under the former, they may be driven away without the consent of the owner, provided this is done under the restrictions imposed, and they are thereafter returned. It is usually the case that animals of different owners customarily graze in common upon the public range. When this is the condition, an owner of a part of the herd can more conveniently and expeditiously separate his from the rest if he may drive the common herd to a near-by corral or other similar inclosure which he can make use of for that purpose, thereafter returning the others to the range. The right to do this was commonly recognized among stockmen in this state at the time the law of 1893 was enacted. By bringing it forward and preserving it in force, it was evidently the purpose of the legislature to give recognition to this custom and denounce as an offense only a violation of it, rather than to declare the more stringent rule found in section 8860. It doubtless also entertained the view that the former would effectively protect the absent owner from loss of his animals by having them driven away and scattered, and at the same time discourage attempted monopoly of the range by a more powerful and aggressive neighbor. It follows, therefore, that the former must be considered the law on the subject with which it deals, though both provisions have been brought forward into the Codes.

It will not be necessary to discuss the evidence in detail. These facts are not controverted: The defendant resides in section 22, township 8 north, range 52 east, being the owner of 400 acres in that section. He owns several other entire sections in

that township. He is also the owner of sections 19, 29, 31 and 33 in township 8 north, range 53 east. The intervening sections are owned in whole or in part by other persons. All of section 20 in this township is open public range, except 160 acres covering the north half of the northeast quarter. At the time this controversy arose, this was under the control of J. H. Bickle, the prosecuting witness. He therefore was entitled to use the entire section. Prior to August 17, 1915, section 29 had been open range, and was pastured in common by cattle of the defendant, Bickle, and others who have homesteads or hold land by some sort of ownership in the neighborhood. Bickle resides in section 4, township 7 north, range 53 east, about five miles southeast of Bradshaw. Mrs. Agnes Barter has a homestead filing in section 34, township 8 north, range 53 east, but the entire section was open range at the time stated in the information, affording water and good pasturage. There is evidence that while the cattle in the community more usually ranged upon sections 20 and 29, they also ranged on section 33 until it was fenced by Bradshaw, and also on section 34. For range during the winter of 1914-15 Bickle had held his cattle in the neighborhood of his home upon the section in which he resides, and others toward the north, and thereafter permitted them to run at large on such public lands as were open range to the north and northwest. For the reason that water was more readily accessible in that locality, they drifted toward sections 33, 29 and 20, and further toward the west, which was mainly open range. In the early part of April, 1915, Bradshaw acquired sections 33 and 29. He inclosed section 33 in June or July. At the time this controversy arose he was engaged in fencing 29. The inclosure was completed on August 19. During the progress of this work, friction had developed between him and Bickle by reason of the fact that Bradshaw had, at different times, driven from section 29 the cattle running at large there, including some of Bickle's. His apparent purpose was to preserve the grass there for his own cattle. The direction in which he drove them depended upon where he found them upon the section. On the

afternoon of August 17 the deputy sheriff, who had been informed of the acts of Bradshaw and was on the watch for him, discovered him and his son, both on horseback, rounding up a number of cattle, including some of Bickle's, near the southeast corner of section 29, and starting them in the direction of section 33. He approached Bradshaw on horseback, and told him not to drive the cattle in that direction, but to drive them to section 20. Upon refusal of Bradshaw to obey, he told him he was under arrest. The latter refused to submit, in the meantime whirling a rope, which he had been using as a quirt. The deputy testified that Bradshaw struck at his horse with the rope, so frightening it that he could not reach Bradshaw to effect his arrest. The deputy then went away, saying that he would have the sheriff come the following day and make the arrest. Bradshaw then drove the cattle through a gap in the fence upon section 33, and thence over upon section 34.

It is the policy of the federal government that the open, [7] unoccupied public lands shall be free to all persons who desire to use them for grazing their stock. This policy is indicated by the act of Congress approved February 25, 1885 (23 Stat. 321, c. 149), prohibiting the erection of inclosures thereon, except by *bona fide* settlers or persons intending in good faith to make entry of the area so inclosed. This same policy is indicated by our own statute *supra*. No one can lawfully exercise control over any of them to the exclusion of others and thus monopolize the use of them. (*Buford v. Houtz*, 133 U. S. 320, [8] 33 L. Ed. 618, 10 Sup. Ct. Rep. 305.) Even when one has acquired title to portions of them, these are still open to use by animals running at large, until the owner chooses to make exclusive use of them. The owner is entitled to so use them at any time, for the ownership of property carries with it the right to the exclusive possession and enjoyment of it. (Rev. Codes, sec. 4421.) He may exercise this right either by erecting lawful inclosures or by preventing encroachment by animals running at large, by keeping them driven beyond his boundaries. His right extends no further than to drive them across his own

boundaries; but he is not bound to drive them to one portion of their customary range rather than to another.

The purpose of defendant here was, not to monopolize any [9] portion of the public range, nor to drive the cattle away from it, for section 34 was a part of it, but merely to drive them entirely from his own land, leaving them on the range immediately in the vicinity of lands of their owner. This he had a right to do, and in doing so committed no offense.

The judgment and order are therefore reversed, and the cause is remanded to the district court, with directions to discharge the defendant.

Reversed and remanded.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

STATE, RESPONDENT, v. POSTAL TELEGRAPH CABLE CO.,
APPELLANT.

(No. 3,907.)

(Submitted November 23, 1916. Decided December 18, 1916.)

[161 Pac. 953.]

Criminal Law—Horse-races—Betting—Telegraphs—Transmission of Information—Evidence—Insufficiency—Circumstantial Evidence—Trial—Exceptions.

Criminal Law—Circumstantial Evidence—Quantum of Proof.

1. Where a conviction is sought upon circumstantial evidence alone, the circumstances proved must not only be consistent with each other and with the hypothesis of defendant's guilt, but inconsistent with any rational hypothesis other than defendant's guilt.

[As to circumstantial evidence, see notes in 62 Am. Dec. 179; 97 Am. St. Rep. 771.]

Same—Conviction—Conjecture Insufficient Basis.

2. A conviction cannot be founded upon conjecture, however shrewd, nor upon probabilities, however strong.

The question as to whether chain theory applies where the evidence is wholly circumstantial is discussed in a note in 41 L. R. A. (n. s.) 749.

Same — Horse-races — Betting — Evidence — Insufficiency — Telegraphs — Transmission of Information.

3. Evidence *held* insufficient to justify conviction of a telegraph company for transmitting information for the purpose of having a bet or wager made upon a horse-race in violation of Chapter 55, Laws of 1915.

Same—Trial—Exceptions—Duty of Court.

4. An exception to an adverse ruling by the district court is a matter of right—not one of grace or discretion on the part of the court—and when taken, the court stenographer must enter it.

Same—Horse-races—Betting—Transmitting Information—Precautionary Instruction.

5. Since the offense denounced by Chapter 55, Laws of 1915, consists in transmitting information concerning a horse-race for the purpose of having bets or wagers made, an instruction should be given in a prosecution for such an offense that it is not wrongful to transmit such information if bets or wagers are not to be made.

Appeal from District Court, Silver Bow County; Michael Donlan, Judge.

THE POSTAL TELEGRAPH CABLE COMPANY was convicted of communicating and transferring information for the purpose of having a bet or wager made upon a horse-race, its motion for new trial was overruled, and it appeals. Reversed and remanded.

Mr. William Meyer, for Appellant, submitted a brief and argued the cause orally.

Mr. J. B. Poindexter, Attorney General, and *Mr. C. S. Wagner*, Assistant Attorney General, for Respondent, submitted a brief.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The Postal Telegraph Cable Company was convicted of communicating and transferring information for the purpose of having a bet or wager made upon a horse-race, and appealed from the judgment and from an order denying its motion for a new trial.

The evidence discloses: That about January 18, 1916, two [3] saloon-keepers in Butte were making and registering bets

upon horse-races presumably being run at Juarez, Mexico, and New Orleans, Louisiana; that the necessary information concerning the races was furnished to the bookmakers by one Harris; that Harris employed a stenographer to make copies of the race-sheets, which disclosed the character of the races, the names and numbers of the entries, the names of the riders, the betting odds, *etc.*, which sheets were thereafter delivered to the bookmakers; that the stenographer had an office or workroom in the Pennsylvania Block, in Butte; that messenger boys from the defendant company's office were seen frequently going from the telegraph office to the Pennsylvania Block; that on January 15, 1916, Walter Reed delivered to a messenger from defendant's office a message for transmission to Kansas City; that a reply was received, but not over the defendant's line; that on one occasion, when the report of the races was delayed, one of the bookmakers went from his place of business to the defendant's office, and upon his return reported that "there was wire trouble; the results would be coming in very shortly"; that on another occasion the other bookmaker visited the defendant's office; that on January 17, 1916, C. C. Slavens sent a code message by the Western Union Telegraph Company to the Thiel Detective Agency in Kansas City; that on January 18 the clerk of the Butte Hotel delivered to Slavens a paper in the form of message blanks used by the defendant, upon which was printed and written the following:

"Bo Kansas City Mo Jany 18-16.

"C. C. Slavens, Butte Hotel, Butte, Mont.

"Bet on Quiz fifth race to-day at Juarez straight, place and show.

"HENDERSON."

that the Western Union, the Continental and the Postal Telegraph Companies were engaged in business in Butte; that in addition there were three or more private wires into Butte, and telephone and letter communications reaching Butte. There was evidence tending to show that the Slavens message was not transmitted by either the Western Union or Continental.

The foregoing fairly epitomizes the material evidence in the case, and much of this was purely hearsay, introduced over the objections of the defendant.

It will be observed that there is not a scintilla of direct evidence connecting the defendant with the violation of Chapter 55, Laws of 1915, the statute under which this prosecution was [1] sought to be maintained. This fact alone is not significant, for circumstantial evidence is legal evidence, and if it is of such quantity and quality as to establish a defendant's guilt beyond a reasonable doubt, it will sustain a conviction. It is the rule in this state, however, that where a conviction is sought upon circumstantial evidence alone, the circumstances proved must not only be consistent with each other and with the hypothesis of defendant's guilt, but inconsistent with any rational hypothesis other than his guilt. (*State v. Chevigny*, 48 Mont. 382, 138 Pac. 257; *State v. Suitor*, 43 Mont. 31, Ann. Cas. 1912C, 230, 114 Pac. 112; *State v. Allen*, 34 Mont. 403, 87 Pac. 177.)

The statute in question declares it to be a misdemeanor for anyone to make, report, record or register a bet upon the result of a contest of speed of an animal, and likewise makes everyone a principal offender who aids or abets such unlawful acts by transmitting, communicating or transferring information for the purpose of having such a bet made, reported, recorded or registered. There is not any evidence indicating the source from which or through which Harris received the information which he furnished to the bookmakers. The Reed telegram does not fall under the ban of this statute, and the answer to it was not transmitted by the appellant. Assuming, for the purpose of this appeal only, that the Slavens message contains information the transmission of which would constitute a crime, the record is barren of any evidence that it was communicated by the defendant. The clerk of the Butte Hotel was not called as a witness. From whom, if from anyone, he received the message; whether such a message was ever delivered to the defendant at Kansas City for transmission, or was ever transmitted by defendant; whether the message was a *bona fide* one or one pre-

pared in Butte—are all questions left without any evidence whatever to suggest their solution. Indeed, the evidence as a whole does not do more than furnish an uncertain basis for a vague suspicion that possibly defendant may be guilty, but in this state the rule is declared by statute “that in criminal cases guilt must be established beyond reasonable doubt.” (Rev. [2] Codes, sec. 8028.) A conviction cannot be founded upon conjecture, however shrewd, nor upon probabilities, however strong. (*State v. McCarthy*, 36 Mont. 226, 92 Pac. 521; *State v. Taylor*, 51 Mont. 387, 153 Pac. 275.)

In the first instance, it was competent for the state to show that race-track gambling was being conducted in Butte, the methods by which bets were made and recorded, and the paraphernalia used. This evidence became immaterial, however, unless the prosecution followed it up by proof that the defendant aided or abetted such unlawful acts. So much of the evidence introduced upon the trial of this case was hearsay, and consisted of declarations of third parties not made in the presence of the defendant or any of its agents, that to review every error predicated upon the rulings admitting it would extend this opinion to an unreasonable length. It is altogether improbable that such errors can occur upon a second trial.

During the course of the trial, counsel for defendant sought [4] to have an exception entered, but the court remarked: “Your exception is denied.” It certainly never could have occurred to anyone before that an exception to an adverse ruling by a court is a matter of grace or discretion upon the part of the court. An exception is a matter of right, and, when taken, the duty of the court stenographer to enter it is imposed by law (Rev. Codes, sec. 6375), any opinion of the trial court to the contrary notwithstanding.

Under the statute in question it is not an offense to transmit [5] information concerning a horse-race unless done “for the purpose of having bets or wagers made or reported or recorded or registered.” An instruction upon this subject should have

been given, to the end that the jurors might receive a correct impression of the purpose of the statute.

With the exception of the last sentence, defendant's offered instruction 10A correctly states the law, but with that sentence added it might have misled the jury, and for this reason we think the court was not in error in refusing it.

The judgment and order are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

STATE EX REL. FURNISH ET AL., RESPONDENTS, v. MULLENDORE ET AL., APPELLANTS.

(No. 3,823.)

(Submitted November 23, 1916. Decided December 19, 1916.)

[161 Pac. 949.]

New Counties—Indebtedness—Apportionment—Bridges—Certiorari—Mandamus—Parties.

Public Boards—Error Within Jurisdiction—*Certiorari*.

1. Error committed by a board of commissioners appointed to adjust the indebtedness between an old and a newly created county—a function judicial in character—in taking bridges into consideration as county property, constitutes error within jurisdiction not correctible by *certiorari*, even though provision is not made for an appeal or some other mode of review of the board's action.

***Certiorari*—Office of Writ.**

2. The office of the writ of *certiorari* is to annul, modify or affirm the action of an inferior tribunal; it cannot supply defects or restrain excesses.

Appeal and Error—Moot Questions—Judgment—Effect.

3. The judgment of the district court in modifying on *certiorari* the findings of a board of commissioners intrusted with the adjustment of the indebtedness between an old and a new county, when the writ did not lie, amounted to a judgment upon a moot question, and therefore was not effective for any purpose.

[As to questions reviewable upon *certiorari*, see note in 40 Am. St. Rep. 29.]

Counties—Bridges—Not County Property.

4. Bridges belong to the public and not to any particular county, irrespective of the source from which the funds—special or otherwise—for their construction were derived.

Public Boards—New Counties—Apportionment of Indebtedness—*Mandamus*.

5. *Mandamus* is the proper remedy to compel commissioners appointed to adjust county indebtedness between an old and a new county to reassemble and correctly apportion such indebtedness; the fact of their adjournment being immaterial.

Same—*Mandamus*—Parties.

6. *Mandamus* proceedings to compel commissioners to correctly apportion the indebtedness between an old and new county should be brought in the name of the county, and not by the board of county commissioners in their official capacity.

Appeal from District Court, Custer County; Daniel L. O'Hern, Judge.

Certiorari by the State on the relation of R. T. Furnish, Robert Yokley and Charles Daly, as Commissioners of the County of Custer, Montana, against Henry Mullendore, John Oliver, and Thos. Wear, Commissioners, T. S. Garlow, Secretary, and F. C. Bunn, Clerk and Recorder for Fallon County, Montana. Judgment for relators and defendants appeal. Reversed with directions to quash the writ and dismiss the proceedings.

Mr. Chas. J. Dousman and *Mr. E. S. Booth*, for Appellants, submitted a brief and argued the cause orally.

Mr. Frank Hunter and *Mr. Geo. W. Farr*, for Respondents, submitted a brief and argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

During the year 1913, under the provisions of Chapter 112 of the Laws of 1911 as amended by Chapter 133 of the Laws of 1913 (Laws 1911, p. 205; Laws 1913, p. 484), providing for the formation of new counties, Fallon county was created out of territory theretofore included in Custer county. The organization of the board of commissioners of the new county was perfected on December 8, 1913. The board at once gave to the

governor the notice required by section 6 of the Act. As therein provided, the governor appointed three commissioners to ascertain and declare the proportion of the indebtedness of Custer county outstanding at the date of the organization of Fallon county, which should be paid by the latter, as provided in section 7 of the same Act. The three commissioners so appointed were John Oliver, residing at Ekalaka, Fallon county; Thomas Wear, residing at Miles City, Custer county; and Henry Mullendore, residing at Glendive, Dawson county. On January 2, 1914, the commissioners convened at Ekalaka, then the county seat of Fallon county, and, having effected an organization by choosing Mullendore for their chairman and T. S. Garlow for their secretary, proceeded to perform the duty enjoined upon them. On February 2, Mullendore and Oliver, a majority of the commissioners, certified the result of the proceedings in a report in duplicate to the respective boards of commissioners of Custer and Fallon counties. They found Fallon county indebted to Custer county in the sum of \$44,486.20. This result was reached by the majority by pursuing the method of adjustment pointed out by section 7 of the Act. In ascertaining the value of the property to be included in the adjustment, with the county courthouse, the county poor farm, moneys in the treasury, etc., they took into account and treated as property belonging to Custer county several steel bridges recently constructed or then substantially completed, whereas, if these bridges had been disregarded and omitted from the adjustment, Fallon county would have been found to be indebted to Custer county in a much larger sum. In a minority report made by Commissioner Wear, who thought that all bridges should be excluded, the amount due from Fallon county was found to be \$113,919.96. Thereupon the commissioners of Custer county, deeming themselves beneficially interested, applied to the district court of that county for a writ of *certiorari* to have the adjustment, as certified by Mullendore and Oliver, reviewed and modified in so far as bridges had been considered county property and included in it. Upon service of the writ the defendants

appeared and moved for an order quashing it, and dismissing the proceeding on the ground that the court was without jurisdiction to issue and determine it. The motion having been denied, the court heard the controversy upon a return of the record of the proceedings of the commissioners, aided by explanatory statements under oath by Mullendore and Oliver. It held that bridges are not county property within the meaning of the statute, and modified the result reached by the majority report, by excluding all bridges. It also modified the report in other minor particulars, and adjudged the amount due from Fallon county to be \$105,190.15. The cause is before this court on appeal from this judgment.

The first contention made by defendants is that, however [1] erroneous may have been the result reached by the majority of the commissioners, the error cannot be corrected by *certiorari*. "A writ of review may be granted by the supreme court (and in proceedings for contempt, in the district court, by any justice of the supreme court), or by the district court or any judge thereof, when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal nor, in the judgment of the court any plain, speedy and adequate remedy." (Rev. Codes, sec. 7203.) That the writ may be successfully invoked under this provision it is indispensable that it appear (1) that the inferior court, tribunal, board or officer the validity of whose action is questioned has exceeded its or his jurisdiction; (2) that there is no appeal; and (3) that there is no plain, speedy or adequate remedy other than *certiorari*. (*State ex rel. White-side v. First Judicial District Court*, 24 Mont. 539, 63 Pac. 395.) It may be conceded at the outset that the power vested in such commissioners under their appointment is judicial in its nature, and that their action would, in a proper case, be subject to review by *certiorari*, just as may be the action of a board of county commissioners in a like case. (*State ex rel. Jacobson v. Board of County Commrs.*, 47 Mont. 531, 134 Pac. 291.) It may be conceded, also, that no appeal lay from the final action

of the commissioners because the statute does not provide for one. Did the commissioners exceed their jurisdiction?

By referring to the statute defining the functions of the commissioners (sec. 7), we do not find any statement as to what shall be considered property of a county, nor any enumeration classifying the items to be considered by them. True, the phrase "property belonging to the old county," and similar expressions employed therein, would seem to refer only to property owned by a county in its proprietary capacity, as distinguished from that in which it has only a qualified interest as trustee for the general public, such as public highways and the like. (Elliott on Roads and Streets, 3d ed., sec. 52.) It is also true that this court has held that, in view of the express provision of the statute upon the subject (Laws 1913, sec. 3, Chap. 1, p. 139), a bridge is a part and parcel of the highway upon which it is built (*State ex rel. Foster v. Ritch*, 49 Mont. 155, 140 Pac. 731; *State ex rel. Donlan v. Board of Commrs.*, 49 Mont. 517, 143 Pac. 984); nevertheless we do not think that in including the bridges the commissioners exceeded their jurisdiction in the sense meant by the statute. They were empowered to make the adjustment. To accomplish this they were vested with the power to determine what was the indebtedness of Custer county, what property belonged to it, what part of this, if any, was within the boundaries of Fallon county, what was the value of all of it and, after making the proper charges to Custer county and deducting these from the gross sum of the indebtedness, to declare the balance due from Fallon county. This necessarily involved a determination of questions of law and fact, because otherwise no final result was possible. As is the case with all such bodies, they might err in their judgment, but it was within their power to decide the questions presented during the course of their deliberations. This implied the power to decide wrong as well as right with reference to any particular matter, and though their decision might be manifestly erroneous, they did not, to this extent, lose jurisdiction of the subject matter which they had under consideration. The

error was error within jurisdiction. Otherwise, as was suggested in *State ex rel. Whiteside v. First Judicial District Court, supra*, the decision must have been right in any event, or there was excess of jurisdiction. The case is not made different by the fact that the legislature has not provided for an appeal or some other method of review. The defendants are right in their contention, and it must be sustained.

It should be sustained for another reason. When the commissioners had filed their report in duplicate with the boards of commissioners of Custer and Fallon counties, their power, so far as they could voluntarily act, ceased to exist. It could not thereafter be put in motion except by judicial process appropriate to compel the commissioners to reassemble and proceed in conformity with the law. The office of the writ of *certiorari* [2] is to annul, modify or affirm the action of the inferior tribunal, board or officer to whom it is directed. (Rev. Codes, sec. 7210.) It cannot supply defects or restrain excess. Recognizing the true scope of the writ, the court in this case did not [3] go further than modify the result as reached by the commissioners; in other words, it merely declared the law which should have controlled the commissioners, by ascertaining what it found to be the correct balance. The result is that its judgment was for all practical purposes upon a moot question, and was not effective for any purpose. In pronouncing the decision, the presiding judge expressed the opinion that some other appropriate proceeding must still be resorted to in order to compel the board to reassemble and proceed in conformity with his view. In this he was correct, but should have declined to direct a judgment which could not have any effective operation.

The foregoing remarks dispose of this case. It is not out of place, however, to notice briefly some of the other questions submitted for our consideration.

Counsel for the defendants contend that the decisions in [4] *State ex rel. Foster v. Rich* and *State ex rel. Donlan v. Board of Commrs., supra*, are not conclusive of the ownership of the bridges in question, because they had been or were being

constructed by the use of funds derived from the sale of bonds for this special purpose. We do not think there is any merit in this contention. In such cases, funds are designated as "special" because they have been provided by the sale of bonds by the board of county commissioners for the particular purpose of constructing bridges, after securing the consent of the electors. These funds may not be expended for any purpose other than that for which they have been provided. (Const., Art. XIII, sec. 3.) But the method by which they have been provided does not in the least affect the relation of the county to the public property acquired by means of them. If such funds have been provided for county purposes, such as the erection of a county courthouse, title to the property for which they are expended vests in the county in its proprietary capacity. If, however, they have been provided for the construction, repair, or improvement of public roads, bridges, *etc.*, the expenditure of them inures to the public benefit, just as does the expenditure the commissioners may make at any time for the same purposes out of the general funds of the county. If the highways belong to the public, it must follow that anything permanently affixed to them, either in the way of repairs or in the form of completed structures, such as bridges and the like, becomes a part of them, and as much of public right as the highways themselves. It is undoubtedly true that materials purchased by a county for the construction of a bridge, for instance, belong to the county until they are affixed to the highway. After this has been done, however, especially after the structure is substantially completed, the right of the public is complete, because in legal theory the structure has become permanently affixed to the public property. A different situation might call for a different conclusion, such as when the structure has not been so far completed that it is of any practical use. In such a case it might well be said that the public right has not attached.

After this controversy arose, the legislature amended section 7 of the Act, *supra*, by providing that steel bridges in use for a shorter period than ten years shall be considered county prop-

erty. (Chap. 139, Laws 1915, p. 301.) The question presented here will therefore probably not arise again.

Counsel for plaintiff submit the question whether, if *certiorari* is not the proper remedy, *mandamus* may be successfully invoked. That the latter is the proper remedy we think is clear. "It may be issued * * * to any inferior tribunal, corporation, board or person, to compel the performance of an act, which the law specially enjoins as a duty resulting from an office, trust or station." (Rev. Codes, sec. 7214.) Under the decisions in *State ex rel. Foster v. Rich* and *State ex rel. Donlan v. Board of Commrs.*, *supra*, it was the manifest duty of the commissioners to include in the adjustment only property belonging to Custer county, and exclude all other. This latter they failed to do, thus being guilty of a delinquency affecting substantially the rights of Custer county. They then adjourned. In order to perform their duty correctly, they must reassemble and formulate another report, excluding the property improperly included. *Mandamus*, it seems, is the only remedy adequate to compel this result.

It is not to the point to say that the commissioners have adjourned and cannot now act. Their office cannot be considered ended until they have performed their duty properly. Until they have done this, they are not beyond appropriate legal process to correct their dereliction. Nor is it to the point to say that the writ will control their discretion or compel them to render any particular decision. They have no discretion in the matter. The writ should go whenever there is no speedy or adequate remedy in the ordinary course of law and the person seeking it is entitled to have the defendant perform a clear legal duty. (*Raleigh v. First Judicial District Court*, 24 Mont. 306, 81 Am. St. Rep. 431, 61 Pac. 991; *State ex rel. Bean v. Lyons*, 37 Mont. 354, 96 Pac. 922; *State ex rel. Stuewe v. Hindson*, 44 Mont. 429, 120 Pac. 485.) The decision in *State ex rel. Mount-rail County v. Amundson*, 23 N. D. 238, 135 N. W. 1117, cited by counsel for relators, exemplifies the use of *mandamus* in a case similar in its facts to the one in hand, and besides contains

an instructive discussion of the ownership of bridges on the public highways, and the rights and duties of county commissioners in relation to them. It is entirely in accord with our own views, both as to rights involved and the remedy awarded.

All the parties have assumed throughout that this proceeding [6] was properly instituted by the relators in their official capacity as commissioners of Custer county. Assuming that a taxpayer might have prosecuted it on behalf of the county, the county commissioners, as such, could not do so. The county is the real party in interest. It is a body corporate (Rev. Codes, sec. 2870). Its powers are exercised by the commissioners, it is true (Rev. Codes, sec. 2871), but they are not therefore authorized to bring actions in their official capacity on behalf of the county. There is no provision of law authorizing them to do so. In the absence of such provision, the county by its corporate name is the proper party to bring "all actions and proceedings touching its corporate rights, property and duties." (Rev. Codes, sec. 2872.) Therefore the proceeding should have been brought in the name of the county.

The judgment is reversed, with directions to the district court to quash the writ and dismiss the proceeding.

Reversed.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

STATE, RESPONDENT, v. GAIMOS, APPELLANT.

(No. 3,898.)

(Submitted November 24, 1916. Decided December 22, 1916.)

[162 Pac. 596.]

Criminal Law — Rape — Information — Former Jeopardy—Information—Evidence — Pleading and Proof—Variance—Witnesses—Impeachment—Instructions—New Trial—Newly Discovered Evidence.

Criminal Law—Information—Indorsement of Witnesses' Names.

1. Leave to indorse names of witnesses upon an information during the course of a criminal trial should be granted if the defendant does not show prejudice by reason of such indorsement.

Same—Former Jeopardy—When Defense Available.

2. The plea of once in jeopardy is available where, after the defendant has been brought to trial in a competent court upon a sufficient indictment or information before a jury duly impaneled and sworn, the proceeding has, without necessity or at the instance of the accused, ended in a discharge of the jury before verdict, and the defendant is sought to be tried for the same offense.

[As to identity of offense in plea of former jeopardy, see note in 92 Am. St. Rep. 89.]

Same—Rape—Former Jeopardy—When Defense not Available.

3. Where an information charging rape was dismissed after commencement of trial but before verdict, and a new one filed fixing the time of the commission of the crime fifty days later, the defense of once in jeopardy was not available, since the offense charged in the second information was neither the same but a new and independent one, nor one "necessarily included" in the first charge within the meaning of section 9216, Revised Codes.

Same—Rape—Variance.

4. If the information charging rape fixes a definite date and the evidence discloses that a mistake occurred in the pleading, and that the identical crime charged was committed upon another date, but before the information was filed, the prosecution will not necessarily fail, though defendant may be entitled to a continuance because of the variance.

Same—Rape—Evidence of Other Acts—Admissibility.

5. Though evidence of other acts of like character to that charged in an information for rape is admissible to show the intimate relationship existing between the prosecutrix and the defendant, for the purpose of corroboration, the commission of an independent crime cannot be thus shown.

Same—Pleading and Proof—Election.

6. The state cannot, in a prosecution for rape, prove two or more of such offenses, and then select any one of them as the one for which conviction will be sought, but must, before the defense is gone into, definitely announce which of the acts it relies on as the one charged in the information.

Same—Pleading and Proof—Variance.

7. When the information fixes a date and the evidence shows an act of the character charged at that time, the state cannot claim a conviction under the same information for a similar act at some other time.

Same—Former Jeopardy—Jury Question.

8. In a prosecution for rape, in which defendant pleaded former jeopardy, the question whether the offense charged in the information then before the court was the same as that alleged in a former one was a question of fact for the jury's determination.

Same—Rape—Proof—Uncorroborated Testimony of Prosecutrix.

9. Though in a prosecution for rape, where the state relies upon the uncorroborated testimony of the prosecutrix, the jury should be cautious of convicting, yet a verdict of guilty under such circumstances should not be set aside unless the story told by her is so inherently improbable or is so nullified by material self-contradictions that no fair-minded person could believe it.

Same—Witnesses—Impeachment—Prerequisites.

10. Before a witness can be impeached, the circumstances of time, place, persons present and language used must, under section 8025, Revised Codes, be called to his attention.

Same—Documentary Evidence—Inadmissibility.

11. Statements of a county superintendent of schools based upon the contents of a book not made a record by law nor even a file in her office, the entries in which she had not made and for the correctness of which neither the witness nor anyone else could vouch, were properly stricken.

Same—Rape—Instructions—Harmless Error.

12. Where prosecutrix had testified to two acts of intercourse, one on the date named in the information and another on a previous day, an instruction that it was not necessary for the state to prove the date of the alleged offense precisely as charged in the information was not prejudicial, in view of a further instruction that evidence of other acts than the one charged was admissible only for the purpose of corroboration.

Same—New Trial—Newly Discovered Evidence—Affidavit—Insufficiency.

13. An affidavit on motion for new trial asked for on the ground of newly discovered evidence, expressing a belief that additional evidence might be secured and a hope that if a retrial should be granted, such evidence would be forthcoming, the persons from whom such evidence was expected refusing to make affidavits, held insufficient.

Appeal from District Court, Broadwater County; John A. Matthews, Judge.

GUST GAIMOS was convicted of statutory rape; he appeals from the judgment of conviction and an order refusing him a new trial. **Affirmed.**

Mr. E. H. Goodman and *Messrs. Wight & Pew*, for Appellant, submitted a brief; *Mr. Goodman* and *Mr. Chas. E. Pew* argued the cause orally.

Mr. J. B. Poindexter, Attorney General, and *Mr. Wm. H. Poorman*, Assistant Attorney General, for Respondent, submitted a brief.

MR. JUSTICE SANNER delivered the opinion of the court.

The appellant was convicted of statutory rape, and seeks a reversal of the judgment, as well as of an order denying his motion for new trial on these grounds: (I) That he was put in jeopardy upon an information previously filed and dismissed; (II) that the evidence is insufficient; (III) errors of law occurring upon his trial; and (IV) newly discovered evidence.

I. The information upon which this conviction is based was filed February 25, 1916; it charges the appellant with the commission of an act of sexual intercourse with Rita Smith, a female aged thirteen years, on or about April 7, 1915, in the county of Broadwater; and to it the appellant interposed the pleas of former acquittal and once in jeopardy. There was no basis for the plea of former acquittal, but the plea of once in jeopardy was based upon these facts: An information had theretofore been filed, charging the appellant with the commission of an act of sexual intercourse with the same Rita Smith on or about May 26, 1915, in the county of Broadwater, upon which information he was arraigned and entered his plea of not guilty. His trial upon said charge was set for February 25, 1916, on which day both sides announced their readiness for trial; thereupon a jury was called and sworn, the county attorney made his opening statement, and C. S. Smith took the stand as a witness for the state; the appellant objected to the examination of said Smith because his name had not been indorsed upon the information, and made like objection to any examination as witnesses of Rita Smith and Lena Cullom. These objections being sustained, the county attorney applied for leave to indorse said

names upon the information, which leave was, upon appellant's objection, refused, and thereupon, on motion of the county attorney, the appellant not consenting, the court dismissed said information, and discharged the jury from further consideration of the cause.

Upon just what theory the court refused leave to indorse the [1] names upon the first information, and thereby occasioned its dismissal, we are at a loss to conceive. Nine months before the time it was brought on for trial, this court had decided *State v. McDonald*, 51 Mont. 1, 149 Pac. 279, holding, in effect, that such leave ought not to be refused, but ought to be granted, allowing the cause to be continued or to proceed to trial, according to whether the accused does or does not show prejudice by reason of such indorsement. The defendant in all cases is entitled to know what persons will be called to testify against him, and every reasonable opportunity he might desire to investigate them, or to prepare to meet their testimony, should be accorded him. But he is not entitled to go free or to delay the course of justice merely because the public prosecutor has ignorantly or carelessly omitted to observe the rule prescribed by the statute in this respect.

The state contends there never was any jeopardy on the first [2] information, because that information was dismissed without a verdict, and by the provisions of section 9536, Revised Codes, the dismissal of an action, if a felony, is not a bar to a subsequent prosecution. This section applies to dismissals before a trial has begun and to dismissals in furtherance of justice. We do not see how it can have anything to do with a situation like the present; but, if it has, the section is by no means decisive. The right to immunity from a second prosecution is constitutional (Const., Art. III, sec. 18), and that right is to be measured by the meaning of the term "jeopardy" as employed in the constitutional provision. This is to be ascertained from the state of the law when the Constitution was adopted, not from subsequent legislation; and, as so ascertained, we find that the term was not intended to apply merely to those cases where

a verdict has been rendered (*State v. Keerl*, 33 Mont. 501, 85 Pac. 862), but it applies as well to every case where the defendant has been brought to trial in a competent court upon a sufficient indictment or information before a jury duly impaneled and sworn (8 R. C. L., pp. 138, 139, *et cit.*; 12 Cyc. 261); and whenever such jeopardy has occurred for the same offense, and has, without necessity or the procurement of the accused, ended by a discharge of the jury before verdict, the plea is available. (Rev. Codes, sec. 9317; *State v. Keerl*, 33 Mont. 501, 515, 85 Pac. 862.) Now, the first information against the appellant was sufficient, the failure to indorse the names of the witnesses being, at most, an irregularity correctible upon terms; the discharge of the jury called and sworn to try the appellant for the crime charged by it was not occasioned by unavoidable accident or the procurement of the accused. Hence the question here is whether the jeopardy suffered by the appellant upon the first information was for the same offense as that for which he now stands convicted.

Counsel for the appellant concede that the two informations [3] do not, upon their face, charge the same offense, because the acts alleged as constituting the crime are separated in time by some fifty days; but they argue that since under the decision in *State v. Harris*, 51 Mont. 496, 154 Pac. 198, the act now charged could have been made the basis of a conviction upon the first information, the possibility of such conviction was jeopardy and a bar to the present charge according to the provisions of section 9216, Revised Codes. We think not. The section provides that when a person has been once placed in jeopardy upon an information, the jeopardy is a bar to another information "for the offense charged in the former, or for an attempt to commit the same, or for an offense necessarily included therein, of which he might have been convicted" under that information. The term "offense necessarily included," as here used, has a well-defined significance. It means lower degrees of the crime charged, or minor offenses of the same character, predicated on the same act or acts; it has and can have

no reference to other acts than the one directly presented by the charge, because such other acts, if of like character, may themselves be the bases of independent charges of equal gravity. One rape cannot be included in another any more than one forgery or one murder can be included in another. So that, if it could be possible for the accused, under a given information for rape, to be convicted of a rape other than the one charged thereby—which it is not—the danger of such a conviction is not such jeopardy as will afford a bar under section 9216, against a later prosecution for such other offense.

Again, the appellant misconceives the purport of the Harris decision, though excusably, perhaps, because there is language employed in the opinion which admits the position taken by him upon his plea of former jeopardy. It is said, for instance, that when the accused “has committed several acts constituting a series, upon proof of any one of which he may be convicted, of what substantial consequence is it to him that the prosecuting officer does not make his selection of the particular act until the close of the state’s case?” This language was inapt, and, literally taken, allows an inference which was not intended and is not legally permissible. In that case—a prosecution for rape—the state failed to prove the act charged at the time charged, but did prove that Harris had, within the period fixed by the statute of limitations, committed several acts of that character, and the effect of the decision was to correctly apply two rules of evidence pertinent to this class of cases. The first of these is that the state is not required to prove the date of the crime precisely as alleged in the information—this for the reason that save in those cases where time is a material ingredient of the offense, it is not necessary that the precise time be alleged. (Rev. Codes, sec. 9152.) But the rule of evidence is not wider in its scope than the rule of pleading; it amounts simply to this: [4] If the information fixes a definite date, the prosecution will not fail because the evidence discloses that a mistake occurred in the pleading, and that the identical crime charged

was committed upon a date different from the one named, but before the information was filed, and within the period of the statute of limitations, though the variance may be sufficiently material to call for a continuance. (Rev. Codes, sec. 9174.)

[5] The second rule is that evidence of other acts of like character to that forming the basis of the crime charged is admissible to show the intimate relationship existing between the prosecutrix and the defendant, for purposes of corroboration—this on the theory that such evidence tends logically to prove the offense charged but not to show that the accused committed an independent crime. The information can, however, charge but one offense (Rev. Codes, sec. 9151), and the defendant can

[6] be convicted only of the offense charged. The state cannot prove two or more offenses as such, and then select any one of them as the one for which a conviction will be sought. In 8 R. C. L., page 206, section 200, the rule is well stated as follows: "Whatever may be the object of evidence as to other offenses—whether to prove motive, intent, or guilty knowledge, or to show a general plan or scheme, or to prove identity, or to establish sexual intimacy and opportunity—proof of a distinct substantive crime is never admissible unless there is some logical connection between the two, from which it can be said the one tends to establish the other." What the state can do in such a case as the *Harris Case* and what we said it must do where the evidence does not show an act of the character alleged at the time alleged, but does show several acts of that character within the period fixed by the statute of limitations, is to definitively announce, before the defense is gone into, which of these acts it claims to be the one charged in the information. The very purpose of this is to separate the evidence of the crime charged from that which is merely corroborative, by identifying the act which was from the beginning intended to be charged, and to destroy the possibility of a conviction for any other; and it necessarily precludes the notion that a conviction can be had for any act other than the one

intended from the beginning to be charged. It follows, too, [7] that when the information fixes a date and the evidence shows an act of the character charged as a crime at that time, the state cannot be allowed to claim a conviction under that information for a similar act at some other time. Since the appellant here could have been convicted in the prior proceeding only of the particular offense charged in the first information, his plea of former jeopardy is without avail unless and until he shows that, as a matter of fact, the offense charged in the second information is the same offense as the one charged in the first information.

We acknowledge that the appellant's contention seems to be upheld in the cases cited by him. (*State v. Price*, 127 Iowa, 301, 103 N. W. 195; *State v. Dye*, 81 Wash. 388, 142 Pac. 873.) The reasoning of the *Price Case* does not appeal to us any more than it appealed to that eminent authority in criminal law, Mr. Justice McClain, who, together with Mr. Chief Justice Sherwin, filed a vigorous and, as we think, a sound dissent. The *Dye Case* arose upon an information which fixed no time, but was a blanket charge, or roving commission covering the entire period of the statute of limitations, and the result announced was reached by applying this test of Wharton: "Was the matter set out in the second information admissible as evidence under the first, and could a conviction have been properly maintained under such evidence? If the answer is, 'Yes,' then the plea is sufficient; otherwise it is not." We accept the [8] test and say that, while the matter set out in the present information would have been admissible as evidence upon a trial under the first information, it would not have sufficed for a conviction unless the offense charged in the present information was the offense charged, or intended to be charged, in the first one. As this was a question of fact, fairly submitted to the jury, and as there is nothing in this record to show that such was the fact, and much to show that such was not the fact, no fault can be found with the result in this respect. (Rev. Codes,

sec. 9151; *State v. O'Brien*, 19 Mont. 6, 47 Pac. 103; 8 R. C. L., pp. 120, 121, secs. 92, 93, *et cit.*)

II. It is undoubtedly true that charges such as this are easy to make and hard to defend against even by one who is guiltless; and where the state relies upon the uncorroborated testimony of the prosecutrix, the jury should be cautious of convicting upon such evidence. The reason is that from motives as various as human perversity, the charge may be made when no rape at all has been done, or it may be made against an innocent person when the crime has, in fact, been committed. In the present instance the commission of the crime was never open to question; the prosecutrix, a girl of thirteen, gave birth to a child in January of this year, and the jury have said upon her unsupported testimony that the defendant is guilty. This they could lawfully do if she was worthy of credit (*State v. Vinn*, 50 Mont. 27, 39, 144 Pac. 773; *State v. Peres*, 27 Mont. 358, 71 Pac. 162), and it is not for the members of this court, who did not see the witnesses, to say that the jury were wrong, or that they should have credited the testimony presented in defendant's behalf and constituting, on paper at least, the greater weight of the evidence. Counsel, realizing this, insist that a conviction can be had on the uncorroborated testimony of the prosecutrix only when she is entitled to full credit, and that by reason of her obvious falsehoods and self-contradictions, the prosecutrix at bar ought, as a matter of law, to be held unworthy of credit. This cannot be done. Only in those rare cases where the story told is so inherently improbable or is so nullified by material self-contradictions that no fair-minded person could believe it may we say that no firm foundation exists for the verdict based upon it. (*State v. McMillan*, 20 Mont. 407, 51 Pac. 827; *Escallier v. Great Northern Ry. Co.*, 46 Mont. 238, Ann. Cas. 1914B, 468, 127 Pac. 458.) But the falsehoods and inconsistencies here pointed out are not of this description; they relate to collateral details; some of them are plainly excusable in a child of the age of this prosecutrix, placed in her

position; and while they might have justified distrust on the part of the jury, they certainly did not command it. The jury were authorized to say that she was entitled to full credit, and their declaration that she was so, as implied from their verdict, is final.

III. In addition to the rulings involved in the questions above discussed, the appellant presents as errors of law four other rulings, *viz.*: Refusal to permit Sophia Valles to answer [10] two certain questions asked by way of impeachment, the striking out of certain testimony relating to appellant's attendance at school, and the giving of instruction No. 15.

Sophia Valles was a schoolmate of prosecutrix, and it was sought to show by her that at some time in January or February, 1915, the prosecutrix had said that she was going to marry a neighbor named Doe, and wished she had a dollar for every time that Doe had kissed her. Assuming that these were material matters, we think there was no error. Our statute (Rev. Codes, sec. 8025) prescribes that before a witness can be contradicted as to statements made, the circumstances of time, place, persons present and language used must be mentioned to the witness sought to be impeached; these requirements were only partially met in laying the foundation with the prosecutrix.

The prosecutrix, having testified, not only to an act of sexual [11] intercourse with the appellant on April 7, but also to one on March 5, and that both acts occurred after the close of school for the day, said that appellant had attended school all day on March 5. To refute this, Margaret Mahoney, superintendent of schools of Broadwater county, was called, and testified from a book which purported to be an attendance record of the Barron school, to the effect that appellant had not attended school on either of those days. The book was not by law a record of her office, nor in fact a file therein. The witness did not make the entries, and neither she nor anyone else vouched for their correctness or condition. This appearing, the court struck her testimony, and refused to admit the record in evidence. It is

claimed that this was error, under *State v. Vinn, supra*; but the cases are not parallel. The ruling under the circumstances was correct.

Instruction 15 advised the jury that it was "not necessary [12] for the state to prove the date of the alleged offense precisely as charged in the information herein," and it is claimed this had no place in the charge, because there was no uncertainty in the testimony as to the date, nor any divergence from the date alleged in the information, and therefore the instruction told the jury, in effect, that they might ignore the testimony given on appellant's behalf tending to show that he was elsewhere at the time. We agree that upon this evidence the instruction was unnecessary; but we do not agree that it had or could have the effect assigned to it; nor do we see how it could have prejudiced the appellant in any way. The silent assumption of counsel is that, since the prosecutrix had testified to an act on March 5, the jury might have convicted for that, even though they believed the charge itself based upon the act of April 7, had been successfully met by the evidence on behalf of appellant; but this is untenable in view of instruction No. 23, which told the jury that the evidence of other acts than the one charged was admissible only for the purpose of corroboration.

IV. There is nothing at all in the claim of newly discovered [13] evidence. The affidavit of counsel, filed in support of this ground of the motion for new trial, does not go further than to express a belief that additional evidence contradictory of some of prosecutrix's statements might be secured, and a hope that, if a new trial should be granted, such evidence would be forthcoming. The persons from whom such evidence is expected refused to make affidavits, and this is fatal. (Rev. Codes, sec. 9350.) They were in attendance upon the trial, and no sufficient showing is made to excuse his failure to then elicit such evidence, if in fact it was in existence.

While we may at this distance entertain some misgivings touching the result in this case, we are compelled to hold that

no reversible error has been made to appear. The judgment and order appealed from are therefore affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

Rehearing denied January 21, 1917.

POSTAL TELEGRAPH-CABLE CO. OF AMERICA, APPELLANT, v. NOLAN ET AL., RESPONDENTS.

(No. 3,941.)

(Submitted November 24, 1916. Decided December 23, 1916.)

[162 Pac. 169.]

Injunction Pendente Lite—Telegraph Lines—Trespass—Eminent Domain.

Temporary Injunctions—Discretion.

1. An application for a temporary injunction order is addressed to the sound legal discretion of the trial court, and unless it is made to appear that such discretion was abused, the order will be approved on appeal.

Same—Purpose.

2. The purpose of an injunction *pendente lite* is to maintain the *status quo* until the relative rights of the parties can be determined by a trial on the merits.

[As to injunctive relief as affected by comparative injury to parties, see note in Ann. Cas. 1913A, 248.]

Same—Burden of Proof.

3. To secure an injunction *pendente lite* the party applying for it has the burden of establishing a *prima facie* right to the relief.

Same—Telegraph Lines—When Refusal Error.

4. Where a telegraph company had been in the actual occupancy, as a right of way for its telegraph line, of a strip of ground over public lands before location thereof as a placer mining claim, and an interruption of its business would cause public interests to suffer, equitable interference by injunction was proper to restrain the owners from destroying the line pending determination of eminent domain proceedings instituted by the company to condemn the right of way.

Same—Telegraph Lines—Trespass—Implied Admission—When Refusal of Relief Error.

5. The apparently implied admission in plaintiff company's complaint seeking condemnation of a right of way of the ground covering which it had been in actual occupancy for about twelve years before, that it was a trespasser, *held* not to have been sufficient reason for refusal of a temporary injunction, where there was some evidence that its original entry was made under some color or claim of right.

Same—Telegraph Lines—Trespass—When Refusal of Relief not Error.

6. Refusal of an injunction to restrain owners of a mining claim from interfering with a telegraph company pending its suit to condemn a strip of ground over the claim for its pole line was not an abuse of discretion, where it appeared that the company had, after location of the ground as a placer claim by defendants, erected its line upon the ground without the knowledge or consent of the owners, and had made no offer of compensation therefor.

Eminent Domain—Public Utilities—Choice of Route.

7. The rule that a public utility—such as a telegraph company—has the right to determine for itself where the line of its utility shall be operated refers to its right to condemn, not to any right to trespass upon, private property for that purpose.

Appeal from District Court, Silver Bow County; J. B. McClernan, Judge.

ACTION by the Postal Telegraph-Cable Company, of Montana, a corporation, against Joseph P. Nolan and others. From an order denying application for injunction *pendente lite*, discharging an order to show cause, and dissolving a temporary restraining order, plaintiff appeals. Cause remanded, with directions to issue an injunction *pendente lite* which will preserve the *status quo* upon part of the ground involved in the litigation until final decision on the merits, and, with such modification, order affirmed.

Mr. John G. Brown and Mr. William Meyer, for Appellant, submitted a brief; Mr. Meyer argued the cause orally.

Admitting, for the sake of this argument, that appellant committed a wrong in going upon the Jessie Placer and erecting its line thereon without the consent of respondents, it is our contention that instead of taking the law into their own hands, as was done in his case, respondents could and should have commenced an action for damages against appellant.

At the outset we desire to urge upon the court this proposition: That in the construction of its line, appellant had the right to construct it at such points as it deemed best for its interest. In the case of *Postal Telegraph-Cable Co. v. Oregon etc. R. Co.*, 23 Utah, 474, 90 Am. St. Rep. 705, 65 Pac. 735, it was held that a telegraph company has the right to determine when and where its line shall be built. In *St. Louis etc. R. Co. v. Batesville & W. Tel. Co.*, 80 Ark. 499, 97 S. W. 660, 661, it was held, under circumstances similar to the circumstances in the case at bar, that the defendant was without authority to remove the line so constructed but was limited to an action for damages. (*Bannse v. Northern Pac. R. Co.*, 205 Fed. 328; *Union Pac. R. Co. v. Greeley*, 189 Fed. 1, 110 C. C. A. 571; *Donohue v. El Paso etc. R. Co.*, 214 U. S. 499, 53 L. Ed. 1060, 29 Sup. Ct. Rep. 698; *New England Tel. Co. v. Essex*, 206 Fed. 926.) A case almost an all-fours with the case at bar, and particularly in the application of the principle for which we are contending, namely, that while eminent domain proceedings are pending, an injunction should issue to restrain the destruction of the appellant's line, and which case announces such doctrine as the law, is *Louisville & N. R. Co. v. Western Union Tel. Co.*, 207 Fed. 1, 124 C. C. A. 573. "Where a company is in possession of property in actual use for public purposes, and its title is disputed, and a suit in ejectment has been begun to oust it from possession, a court of equity will entertain a bill to enjoin the ejectment suit and settle the rights of the parties." (4 Cook on Corporations, 7th ed., 3885; *South & North Alabama R. Co. v. Alabama G. S. R. Co.*, 102 Ala. 236, 14 South. 747; *Paterson etc. R. Co. v. Kam-lah*, 47 N. J. Eq. 331, 21 Atl. 954; *Foltz v. St. Louis etc. R. Co.*, 60 Fed. 316, 8 C. C. A. 635.) "In some cases, the ejectment has been enjoined for a specified time to enable the complainant in the bill to condemn." (*Id.*; *Winslow v. Baltimore etc. R. Co.*, 188 U. S. 646, 47 L. Ed. 635, 23 Sup. Ct. Rep. 443.)

Mr. Peter Breen, for Respondents, submitted a brief.

The leading case cited by appellant, to the effect that the respondents are relegated exclusively to an action for damages, is the case of *Gurnsey v. Northern California Power Co.*, 160 Cal. 699, 36 L. R. A. (n. s.) 185, 117 Pac. 906. We find in it, however, that the power company prevailed because of the plaintiff's "inaction"; that "plaintiff stood by without asserting a right which he might have invoked"; that he "acquiesced in the entrance" of the power company on his land. The case of *New England Tel. Co. v. Essex*, 206 Fed. 926, is based upon the proposition of estoppel, and for the purpose of this case we may admit the reasoning of that case, merely contenting ourselves with the statement that there is no estoppel here nor acquiescence by the respondents. And so, likewise, every case cited by appellant has in it the element of inaction, acquiescence, failure to speak and standing by on the part of the owner of the land.

"A corporation in charge of a public use may not condemn whatever it may find it convenient and advisable to acquire on the sole ground that it may save expense or add to the profits of the business." (*Northern Pac. R. Co. v. McAdow*, 44 Mont. 547, 121 Pac. 473.)

The order of the lower court should be affirmed, because the appellant failed to prove that the portion of the Pioneer occupied by it in 1905 and subsequently was public domain of the United States in 1905. The patent to the Pioneer does not contain any express exception in favor of a telegraph company. The exception is, that the premises hereby conveyed shall be held subject to any vested or accrued water rights for mining, agricultural, manufacturing or other purpose. *Prima facie* the Pioneer patent is a grant of all. The nature of the estate obtained by compliance with a location under the mining law has the effect of a grant by the United States of the right of personal and exclusive possession of the lands located, and the patent relates back to the date of location. (Lindley on Mines, 3d ed., sec. 539.) A mining estate is held to be property of

the highest character. (*Belk v. Meagher*, 104 U. S. 279, 284, 26 L. Ed. 735, 737.) This court has always treated a valid location as one that can be made only upon a portion of the public domain then open to location; that the location of a valid mining claim gives the locator the exclusive right to the possession of all of the surface. (*Street v. Delta Min. Co.*, 42 Mont. 371, 112 Pac. 701.) Property thus located becomes a portion of the public domain only by an actual abandonment of the claim by the locator. (*Belk v. Meagher, supra*; *Lavagnino v. Uhlig*, 198 U. S. 443, 49 L. Ed. 1119, 25 Sup. Ct. Rep. 716.) This is the effect of the decision in *Helena Gold & Iron Co. v. Baggaley*, 34 Mont. 464, 87 Pac. 455.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

For a considerable period of time the Postal Telegraph-Cable Company has maintained its telegraph lines from Butte through Silver Bow junction to points within and without this state, and has conducted a general telegraph and cable business, sending messages to and receiving messages from points throughout the world. For two years or more the defendants have owned the Pioneer and Jessie Placer claims, located between Butte and Silver Bow. Prior to the fall of 1914 the telegraph company's pole line and wires followed generally the road between those two points and crossed the Pioneer claim. About November, 1914, the company changed the route of a portion of its line and crossed the Jessie Placer without having obtained a right of way. Negotiations failed to settle the controversy which followed, and defendants destroyed a portion of the line across the Jessie claim and upon their threats to prevent the company from repairing the line, or using the line over either claim, this suit was instituted to secure an injunction. About the same time plaintiff instituted a proceeding in eminent domain to condemn the right of way occupied by it over each of those placer claims. A hearing was had in this suit upon plaintiff's application for an injunction *pendente lite*, but the applica-

tion was denied, the order to show cause was discharged and a temporary restraining order theretofore issued was dissolved. From the order plaintiff appealed.

The application for the temporary injunction was addressed [1-3] to the sound, legal discretion of the trial court, and unless it is made to appear that such discretion was abused, the order will be approved. The purpose of an injunction *pendente lite* is to maintain the *status quo* until the relative rights of the parties can be determined by a trial on the merits. (*Donlan v. Thompson Falls Copper & Mining Co.*, 42 Mont. 257, 112 Pac. 445.) To secure an injunction, the party applying for it has the burden of establishing a *prima facie* right to the relief. To apply these rules in the present instance, it is necessary to consider the relationship of the plaintiff to each of the placer claims separately.

1. *Pioneer Placer*. It appears reasonably certain from the evidence introduced upon the hearing below that the plaintiff's [4] pole line and wires have been in place and in constant use over the same course across the ground now occupied by the Pioneer Placer for at least sixteen years, and that the Pioneer Placer was not located until about 1904. When that claim was located, the ground must have been open, public land of the United States, and while it is not necessary or proper—in advance of a trial of this cause upon the merits—to determine whether plaintiff has a right of way over that claim by virtue of the congressional grant contained in section 5263, U. S. Rev. Stats. (7 Fed. Stats. Ann., p. 205; U. S. Comp. Stats. 1913, sec. 10,072), it is sufficient for the purposes of this appeal to know that plaintiff was in the actual occupancy of the right of way for its lines over this property, before the claim was located and at a time when the ground was public land to which the congressional grant would apply under appropriate circumstances. Added to this, the fact that plaintiff is a public service corporation and that the character of its business is such that public interest will suffer from an interruption, the case-made presents a proper subject for equitable interference by

injunction, until such time as the relative rights of the parties can be heard and determined upon the merits. (*Pennsylvania R. Co. v. Ohio River etc. R. R. Co.*, 204 Pa. 356, 54 Atl. 259; *Gurnsey v. Northern California Power Co.*, 160 Cal. 699, 36 L. R. A. (n. s.) 185, 117 Pac. 906.)

The trial court was doubtless influenced by the fact that [5] upon this hearing plaintiff introduced in evidence its complaint in the condemnation proceedings, and thereby disclosed that by seeking to condemn the same right of way over the Pioneer Placer which it now claims, it impliedly admits defendants' ownership and the absence of any right on its own part. However inconsistent these positions may appear on the face of the records, we think the allegations of the complaint in the condemnation proceedings cannot be held to amount to an admission that plaintiff is a trespasser upon this claim. It is possible to reconcile the allegations of the complaint with the contention now made, and apparently sustained by the evidence, that plaintiff's original entry upon the ground now covered by the Pioneer Placer was made under some color or claim of right.

2. *Jessie Placer.* The evidence discloses that plaintiff erected its telegraph line across the Jessie Placer in the fall of 1914 at [6] a time when the ground was held by defendants under patent from the United States; that the work was all done and the line installed and in operation before any of the defendants knew that an invasion of their property was contemplated; that no attempt was made to secure a right of way; that no permission was sought for the entry upon this claim and no offer of compensation made. The plaintiff appears to be a naked trespasser upon this ground, without even a semblance of a claim to the right of way occupied by it and without any defense whatever for its high-handed, unlawful act. If the maxim, "He who comes into a court of equity must come with clean hands," ever possessed any virtue, this case presents circumstances which command its application.

In laying the foundation for its application for equitable relief, plaintiff disclosed that its property which it seeks to have protected is upon defendants' land without a semblance of right. It cannot be heard to urge the public character of its business as a justification for its trespass. "No one can take advantage of his own wrong." (Rev. Codes, sec. 6185.) While tacitly admitting its wrongful occupancy of this claim, plaintiff nevertheless insists that having commenced condemnation proceedings to condemn the right of way, a court of equity, out of consideration for the public character of its business, ought to maintain the *status quo* until the question of damages can be determined. It would seem to be sufficient answer to say that plaintiff should have reversed the order and secured the right of way by purchase or condemnation before it occupied it. Whether the question of damages will be the only one raised in the eminent domain proceedings cannot be determined from this record.

Section 14, Article III, of our state Constitution provides: "Private property shall not be taken or damaged for public use without just compensation having been *first* made to or paid into court for the owner." In *Flynn v. Beaverhead County*, 49 Mont. 347, 141 Pac. 673, we considered this constitutional guaranty and said: "By force of this provision private property cannot be taken for a public use *in invitum*, except upon compensation first being made to the owner. In other words, the payment or tender of compensation, the amount of which has been ascertained in the manner provided by law, is made a condition precedent to the acquisition of any right by the public. * * * Possession taken from the owner without compliance with this condition is wrongful, and ejectment will lie in favor of the owner to recover."

Counsel for appellant direct our attention to decided cases which they insist support their view; but an examination of them discloses that in every instance there were equitable considerations aside from the public character of the applicant's business. In not one of the cases was the entry sought to be

protected, initiated in naked trespass. There was in every case some sort of claim or color of right.

The case of *Everett Water Co. v. Powers*, 37 Wash. 143, 79 Pac. 617, seems to lend itself in aid of plaintiff's position, but it is directly opposed to the rule adopted by this court in the *Flynn Case* above, and we prefer to follow our own decision.

Counsel insist that a public utility corporation has the right [7] to determine for itself where the line of its utility shall be operated, and cite *Postal Telegraph-Cable Co. v. Oregon S. L. R. Co.*, 23 Utah, 474, 90 Am. St. Rep. 705, 65 Pac. 735, in support of that view. Counsel need not have gone to Utah for their authority. In *State ex rel. Bloomington L. & L. S. Co. v. District Court*, 34 Mont. 535, 115 Am. St. Rep. 540, 88 Pac. 44, this court announced the same rule as the Utah court, but in each instance the court was speaking with reference to a condemnation proceeding, and not with reference to the abstract right which would sanction a trespass upon private property. Subject to the provisions of section 7335, Revised Codes, it is no answer in eminent domain proceedings to say that a route different from the one sought to be condemned would suffice for plaintiff's purposes, but it is a very forceful answer to a naked trespasser to say to him, "You have no right whatever upon my property."

The order of the district court should be modified to meet the views herein expressed. The cause is remanded to the district court, with directions to issue an injunction *pendente lite*, which will preserve the *status quo* upon the ground now covered by the Pioneer Placer claim until the final decision upon the merits. With this modification made, the order will stand affirmed. Each party will pay his costs incurred upon this appeal.

Modified and affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

Rehearing denied January 13, 1917.

STATE EX REL. FADNESS, APPELLANT, v. EIE ET AL.,
RESPONDENTS.

(No. 3,938.)

(Submitted November 24, 1916. Decided December 30, 1916.)

[162 Pac. 164.]

Intoxicating Liquors—Local Option Election—Petition—Qualifications of Signers—Supplemental Petitions—Revocation of Withdrawal of Names—Mandamus—Appeal and Error—Briefs—Transcript—Copies—Service—Technical Violation of Rules.

Appeal and Error—Briefs—Transcript—Copies—Service—Technical Violation of Rule.

1. Technical noncompliance with the rule requiring copies of transcript and briefs to be served upon the attorney general in causes in which that officer must appear by virtue of his office, will not command reversal of an appeal where service of both had been made before submission of the cause and the state suffered no inconvenience because of the delinquency of opposing counsel.

Local Option Election—Petition—Qualifications of Signers.

2. Whether a signer of a petition for a local option election is a taxpayer must be determined by an inspection of the last assessment-roll; and whether he is a qualified elector—the other qualification required by section 2041, Revised Codes—the board of county commissioners may ascertain, in the absence of any statutory direction on the subject, from any competent source of information, including the official register of voters, the testimony of witnesses, and, perhaps, the personal knowledge of the individual members of the board.

Same.

3. The assessment-roll upon which the names of the signers of a petition for a local option election must appear to render them competent to sign it is the last completed roll, i. e., the roll upon which the amount due from each taxpayer appears after both county and state boards of equalization have acted.

Mandamus—Demurrer—Admissions.

4. The allegations of fact in an affidavit for a writ of mandate will, as against a general demurrer and motion to quash, be taken as true on appeal.

Local Option Election—Mandamus—When Proper Relief.

5. Where a board of county commissioners, by filing a general demurrer and motion to quash, admitted that in passing upon the sufficiency of a petition for a local option election it had wrongfully eliminated from it the names of a number of qualified persons sufficient to defeat the petition, the presumption that its official duty had been legally performed disappeared, and relief by way of *mandamus* was proper.

[As to *mandamus* to compel board of canvassers to reassemble and recanvass votes, see note in *Ann. Cas.* 1912C, 1257.]

Same—Supplemental Petitions may be Filed.

6. *Held* that in addition to the petition mentioned in section 2041, Revised Codes, as requisite for the calling of a local option election, supplemental petitions may be filed at any time during the course of the board's deliberations until the matter is submitted for final decision.

Same—Petition—Revocation of Withdrawal of Names—*Mandamus*.

7. The right to revoke his withdrawal from a petition calling for a local option election—thus restoring the signer to his original position—is not absolute, and should not be enforced by *mandamus*.

Appeal from District Court, Sheridan County; F. N. Utter, Judge.

Mandamus by the State on the relation of Andrew Fadness against P. J. Eie, F. A. Weinrich and J. C. Timmons, Commissioners of Sheridan County, Montana. From a judgment for defendants on demurrer and motion to quash, relator appeals. Judgment reversed, and cause remanded, and district court directed to overrule the demurrer and motion.

Messrs. Walsh, Nolan & Scallon, for Appellant, submitted a brief; *Mr. C. B. Nolan* argued the cause orally.

As against a general demurrer and motion to quash, the facts alleged in the affidavit for the writ of mandate will, for the purposes of an appeal from an order dismissing the proceedings, be taken as true. (*State ex rel. Arthurs v. Board of County Commrs.*, 44 Mont. 51, 118 Pac. 804.) On the facts set forth in the affidavit, the motion to quash and the demurrer should have been overruled, and the defendants required to answer. (*State ex rel. Stringfellow v. Board of County Commrs.*, 42 Mont. 62, 111 Pac. 144; *State ex rel. Hauswald v. Ellis*, 52 Mont. 505, 159 Pac. 414; 26 Cyc. 432.)

It was stated by this court in *State ex rel. Lang v. Furnish*, 48 Mont. 28, 134 Pac. 297, that withdrawals should be given effect until the final consideration of the matter. Now, the statute being silent on the subject as to the form of the petition and with no limitation as to the time when petitions should be presented, common sense and common justice alike would suggest that where a petition is presented and efforts are made to

get withdrawals from the petition so that its presentation would be rendered nugatory, a petition thus attacked might be reinforced by procuring additional names. And so, likewise, if a withdrawal to a withdrawal was secured, the withdrawing party directing that the signature on the original petition should be given full force and effect, is it not conformable to reason and common sense that full consideration should be given to this request? These two propositions were considered by the supreme court of Kentucky in the case of *Horton v. Botts*, 158 Ky. 11, 164 S. W. 352, and decided favorably to the contention we are now making. In that case it was held that the petition was in the nature of a pleading; that the supplemental petition was in the nature of an amendment to the original petition, and that the revocation of the withdrawals should have been allowed.

Messrs. Norris, Hurd & McKellar and *Messrs. Babcock & Ellery*, for Respondents, submitted a brief; *Mr. Edwin L. Norris* argued the cause orally.

The functions of respondents as the board of county commissioners were *quasi* judicial. The quality of their acts may easily be determined from an analysis of the duties imposed upon them in respect of the consideration of said petitions. The more important of them were: (a) To determine the genuineness of the signatures appended to such petitions; (b) to determine the qualifications of the respective petitioners as electors. (*State ex rel. Bogy v. Board of County Commrs.*, 43 Mont. 533, 117 Pac. 1062.) Outside of this jurisdiction the same rule is in force. (1 *Woolen & Thornton on Intoxicating Liquors*, sec. 519; *Ferguson v. Board of Suprs.*, 71 Miss. 524, 14 South. 81; *Roesch v. Henry*, 54 Or. 230, 103 Pac. 439.) The determination of the qualification of the respective petitioners as electors was a jurisdictional question. (*Steele v. State*, 19 Tex. App. 425; *Rawl v. McCown*, 97 S. C. 1, 81 S. E. 958.) (c) To determine the qualifications of the respective petitioners as taxpayers. In the determination of this question the respondents were

required to resort only to the last assessment-roll in Sheridan county. (Sec. 2041, Rev. Codes; *State ex rel. Eagye v. Bawden*, 51 Mont. 357, 152 Pac. 761.) (d) To determine the genuineness of the signatures, qualifications, etc., of the names of the persons appended to the withdrawal petitions; (e) To determine the total number of tax-paying electors in Sheridan county whose names appeared upon the last assessment-roll; (f) To make an order calling or refusing to call an election based upon conclusions made in the determination of jurisdictional facts. *State ex rel. Eagye v. Bawden*, 51 Mont. 357, 152 Pac. 761, *State ex rel. Buck v. Board of Commrs.*, 21 Mont. 469, 54 Pac. 939, and *State ex rel. Jacobson v. Board of County Commrs.*, 47 Mont. 531, 134 Pac. 291, seem to be determinative of the proposition that the board in the case at bar exercised quasi-judicial functions, and that the findings of the board of which appellant complains were made pursuant to authority vested in the board, but which carried with it no command that the authority be exercised in any specific manner.

The decision of the respondents cannot be controlled by *mandamus*. *Mandamus* lies only to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station. (*State ex rel. Knight v. Helena Power & L. Co.*, 22 Mont. 391, 44 L. R. A. 692, 56 Pac. 685; *State ex rel. Gibson v. Stewart*, 50 Mont. 404, 147 Pac. 276.) It does not lie to compel the performance of any act which involves the exercise of discretion. (*State ex rel. Gibson v. Stewart, supra.*) Where the duty to be performed is quasi judicial, its performance in any particular way cannot be compelled by *mandamus*. (*State ex rel. Marshall v. District Court*, 50 Mont. 289, 146 Pac. 743; *State ex rel. Gravely v. Stewart*, 48 Mont. 347, 137 Pac. 854.)

As to withdrawals of withdrawals: In the absence of any showing in appellant's affidavit that the withdrawal of withdrawals petition was presented to the board before it had acted upon the withdrawal petition, appellant is not in a position to

claim that the board violated any duty owed to the petitioners. (*State ex rel. Lang v. Furnish*, 48 Mont. 28, 134 Pac. 297.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Application for *mandamus*. The affidavit in support of the application, stripped of immaterial matters, discloses these facts:

On July 10, 1916, a petition was filed with the clerk of Sheridan county, addressed to the board of commissioners, asking that an election be ordered by the board to determine whether or not intoxicating liquors should be sold within the county. The board convened on July 20 to consider the petition. Between that date and July 22, and while the board had the petition under consideration, a supplemental or additional petition was presented. This the board received and considered with the original petition. There were in the meantime presented by a number of signers of these petitions other petitions asking that their names be omitted from the original and supplemental petitions. Later some of these latter presented still other petitions requesting that their names be retained in the list of signers and considered for the purpose of determining the sufficiency of the original and supplemental petitions. The board thereupon adjourned until July 31. After having had all the petitions under consideration from that date until August 2, the board granted the withdrawal petitions, disregarded the petitions retracting the withdrawals, and, concluding that the signers of the original and supplemental petitions who possessed the statutory qualifications to sign them were not sufficient in number, refused to order the election. The board made findings in substance as follows: (1) That the original petition was signed by 1,289 tax-paying electors; (2) that the supplemental petition bore the names of 192 tax-paying electors; (3) that the whole number of tax-paying electors whose names appeared on both petitions was 1,481; (4) that of these, 457 had withdrawn their names; (5) that after deducting the names so withdrawn, there remained upon the original and additional petitions the

names of 1,024 tax-paying electors; (6) that when these petitions were presented to the board there were in the county 3,658 persons who were tax-paying electors; (7) that to authorize the calling of an election as requested, the petitions must have qualified signers to the number of 1,220, or at least one-third of all those who were qualified to sign them; and hence that the petitions did not bear the required number. In addition to the foregoing recitals, the affidavit alleges that the original petition bore the signatures of 1,486 persons who were tax-paying electors, or more than one-third of the electors of the county who were qualified to sign it; that the supplemental petition contained additional signatures, to the number of 208, of persons who were qualified to sign it; that the aggregate of the signers was therefore 1,694; that of the signers of the original petition the board wrongfully omitted from the count 197 names, and from the supplemental petition 16 names, thus reducing the number of qualified signers to 1,481; and that of the 457 persons who requested to have their names withdrawn, 185 retracted the request. It is alleged further that the names of all those who signed the original and supplemental petitions appear upon the assessment-roll for the year 1915, and also upon the official register of voters for the year 1916.

When the board announced its decision, the relator, a resident and tax-paying elector of the county and qualified to sign a petition for an election, applied to the district court for a writ of mandate to compel the defendants to reassemble as a board and order the election. It is demanded that the defendants be required to reassemble and include in the count the names omitted from the signers of the original and supplemental petitions, and also the names of those who retracted their withdrawals therefrom, and that they, as a board, order the election. In answer to the alternative writ, the defendants appeared by general demurrer and motion to quash, on the ground that the facts stated in the affidavit did not warrant relief. The demurrer and motion were sustained, and judgment went for the defendants. The relator has appealed.

1. At the argument the attorney general submitted a motion to dismiss the appeal, for the reason that he had not been served [1] with a copy of the transcript nor with copies of defendants' brief, as required by Rule IX (123 Pac. xii), and subdivisions 2 and 7 of Rule X (123 Pac. xii) of this court. From a technical point of view the motion was well made. Inasmuch, however, as service in both particulars was had before the submission of the motion and the state has suffered no inconvenience by the delinquency, the motion is denied. The delinquency by counsel for the relator was evidently due to oversight. This being so, the dismissal would be without prejudice to another appeal. The granting of the motion would therefore serve no useful purpose.

2. Counsel submit the question, What course must the board have pursued in order to determine the qualifications of the [2] signers of the original and supplemental petitions and the genuineness of their signatures? The application was addressed to the board in pursuance of section 2041 of the Revised Codes. Considering this section in *State ex rel. Eagye v. Bawden*, 51 Mont. 357, 152 Pac. 761, we held that the two qualifications which the signers must possess are: (1) That they must be qualified electors, and (2) that they must be taxpayers. That they possess the latter qualification, it was held, must be shown exclusively by the presence of their names upon the last assessment-roll. When this has been ascertained, it must further be determined whether they are qualified electors, or, in the language of the statute, "voters who are qualified to vote for members of the legislative assembly." The latter expression must be understood to be neither more nor less comprehensive than the former, for all persons who possess the qualifications enumerated in section 2, Article IX, of the Constitution are qualified electors. How to ascertain that the signers come within this class, the statute does not point out. That a person is a taxpayer is not an evidence of the fact that he is also a qualified elector, for he may be a nonresident or an alien, or be affected by some other disability. The assessment-roll could not disclose any in-

formation on the subject. So the official register of voters, while it may properly be consulted for such information as it contains, is not conclusive as to who are and who are not qualified electors. A particular name appearing thereon may be that of a person who has removed from the state, or who has died or who has otherwise lost his right to vote. Again, the name of a person may be signed to the petition who is both a taxpayer and a qualified elector within the meaning of the Constitution, and yet his name is not to be found upon the official register. He is none the less a qualified elector and entitled to sign the petition. It is only when the statute requires petitions by electors to initiate proceedings, such as we are now considering, to be signed by registered voters, that the signers must be such. "Registration is no part of the qualifications of an elector and adds nothing to them; it is merely a method of ascertaining who the qualified electors are, in order that abuses of the elective franchise may be guarded against." (*State ex rel. Lang v. Furnish*, 48 Mont. 28, 134 Pac. 297.) The statute might have prescribed the requirement, as it does in case of a petition to initiate proceedings to establish a new county (Laws 1915, Chap. 139, p. 301); but, as it does not, an elector whose name is on the last assessment-roll is qualified to sign a petition for all the purposes of this particular proceeding. In *State ex rel. Eagye v. Bawden*, *supra*, referring to the office served by the assessment-roll, this language was used: "The last sentence of section 2041 commands the board to determine the sufficiency of the petition by reference to the last assessment-roll. The provision is exclusive. The board is not authorized to consult any other source of information or to receive evidence which does not appear upon that roll." Taken without reference to the particular point under discussion, the statement is perhaps misleading. It would confine the board to the examination of the assessment-roll only for all purposes. That this is not the import of the excerpt quoted is clear when read in its proper connection. Since the course to be pursued by the board in ascertaining whether the signers are qualified electors is not

pointed out, it may undoubtedly resort to any competent source of information available, including the official register, the testimony of witnesses, and, perhaps the personal knowledge of the individual members. (*State ex rel. Bogy v. Board of County Commrs.*, 43 Mont. 533, 117 Pac. 1062; *State ex rel. Lang v. Furnish, supra.*)

In view of the foregoing remarks, the allegation in the affidavit that the names of all the petitioners appear upon the official register was not necessary. Nevertheless its presence therein does not impair the relator's title to relief, if the material facts stated warrant it.

3. It will be observed that the affidavit alleges that the names of the signers of the petitions appear upon the assessment-roll for the year 1915. Under section 2545 of the Revised Codes, the assessor is required to have his assessment-book completed on or before the second Monday of July. It must immediately then be delivered to the county clerk. (Sec. 2547.) For the year 1916 the assessor was required to have his book completed on or before July 10, because the second Monday fell on that date. In this connection the inquiry is suggested by counsel for defendants, whether the roll of 1916 or that of 1915 should have been used by the board to ascertain the tax-paying qualifications of the signers of the petitions. The purport of the [3] suggestion is apparent. The statute constitutes the assessment-roll which is latest in date the only evidence by which to determine the tax-paying qualification of the signers of the petition. As all those who were taxpayers in 1915 are not necessarily taxpayers in 1916, the affidavit does not show that the names of the signers were upon the last assessment-roll, and therefore does not state a cause warranting the relief demanded. The suggestion is devoid of merit. That the reference in the statute is to the completed assessment-book, which is the basis for the levy of taxes in the county for any year, is made apparent by noting the steps necessary to make it up in its final form: The assessor must list all property in his county in an assessment-book under appropriate headings. (Rev. Codes, sec. 2543.)

When this has been completed and delivered to the clerk as directed by sections 2545 and 2547, *supra*, the clerk gives notice of the fact by publication, and also that the board of commissioners will meet to equalize the assessments. (Sec. 2547.) The board sits for this purpose from time to time, from the third Monday in July until the second Monday in August. (Sec. 2572.) Its powers and duties in relation to the individual assessments and the changes it may make in them are defined in sections 2573 to 2581. The changes wrought by it must be noted by the clerk and entered on the book in the proper places. (Sec. 2582.) At the conclusion of its sitting the board must fix the rate of taxation for the year. (Sec. 2598.) The clerk then ascertains the gross sum of all the assessments and transmits it to the state auditor and the state board of equalization. (Sec. 2606.) Thereupon the assessments of the several counties, as shown by the several assessment-books, are equalized by the state board of equalization. (Secs. 2583-2592.) Such changes as this board may have made must be noted and entered upon the assessment-book by the county clerk, who must also enter therein the assessments made by the state board upon property assessable only by the state board. (Secs. 2604-2607.) The sum of the corrected assessments of the several counties, with the additions made by the state board of equalization, is the basis for taxation for state purposes at the rate fixed biennially by the legislature. (Sec. 2593.) When the assessments have been equalized and the necessary changes made, the clerk must sum up the values of the different kinds of property assessed to each owner, and also the gross amount of all assessments as fixed by the equalizations. (Sec. 2604.) He must then calculate and extend to the proper column the amount due from each taxpayer for the year, at the combined rates fixed by the county board and the legislature. (Sec. 2608.) The book is then completed and becomes the basis—or the assessment-roll—for the payment of taxes for the current year. In the even-numbered years it must also be used as the basis for the classification of the several counties provided by section 2975. In

view of these considerations it requires no argument to demonstrate that the assessment-book delivered to the clerk on July 10 was only a tentative basis for the levy of taxes for the year 1916, and did not become an assessment-roll until completed by the clerk as above indicated. The roll for the year 1915 was the only one to which reference could be had.

4. For the purposes of this appeal the allegations of fact [4] contained in the affidavit must be accepted as true. (*State ex rel. Arthurs v. Board of County Commrs.*, 44 Mont. 51, 118 Pac. 804.) It is alleged that the signers of the two petitions to the number of 1,694 were tax-paying electors. This number includes the names (213) dropped from the petitions. Accepting these allegations as true, it necessarily follows that the action of the board was wrong, whatever may have been the basis of it—whether it concluded that the excluded names were not those of taxpayers, or that they were not electors, or that their signatures were not genuine. Counsel argue, however, that the findings which are set out in the affidavit traverse these allegations, and hence that there is disclosed on the face of the affidavit itself an issue of fact which requires an affirmance of the judgment of the district court. This process of reasoning we cannot appreciate.

It was not necessary that the findings be set out in the affidavit. This was evidently done in order to disclose fully the result of the board's proceedings; but that they were so set out [5] does not impair in any way the force of the allegation that they were without foundation in fact. The truth of them was the ultimate issue tendered by the relator. Instead of meeting the issue as tendered, the defendants were content to admit their falsity and tender an issue of law as to the sufficiency of the allegations impeaching them. How, it may be asked, can findings which have no basis in fact become impregnable the moment they are assailed by one who has been aggrieved by them? If counsel's position is maintainable, then it matters not that the findings were the result of the most arbitrary course by the board; they must nevertheless stand as their own vindica-

tion. The material fact being admitted as true, *vis.*, that the omitted names were the genuine signatures of tax-paying electors, it was to be accepted as true for all purposes. If these signers were taxpayers and qualified voters, there was nothing left for the board but to perform its imperative duty to order the election. It is of no avail for counsel to say that the board was exercising judicial powers, and in support of its action to invoke the aid of the presumption that its official duty was legally performed. The presumption disappears in face of the admitted fact that the board wrongfully eliminated the names of 213 persons who were qualified to sign the petition, and then refused to order the election. That under such circumstances relief will be granted by *mandamus* is no longer open to discussion in this jurisdiction. The following cases, though differing from this one in their facts, are amply sufficient to show that the rule is firmly established: *State ex rel. Stringfellow v. Board of County Commrs.*, 42 Mont. 62, 111 Pac. 144; *State ex rel. Arthurs v. Board of County Commrs.*, 44 Mont. 51, 118 Pac. 804; *State ex rel. Hauswald v. Ellis*, 52 Mont. 505, 159 Pac. 414; *State ex rel. Furnish v. Mullendore*, *ante*, p. 109, 161 Pac. 949.

The original and supplemental petitions were signed by 1,694 persons who were tax-paying electors. Assuming that the board properly excluded the names of all the 457 persons who withdrew, there remain 1,237 qualified signers, or more than one-third of the tax-paying electors in the county. The district court should have overruled the demurrer and motion, and heard the application on its merits.

5. But counsel for defendants contend that the board was [6] without authority to receive and consider the supplemental petition after it had convened on July 20 to consider the original petition. If this contention is sustained and the 457 withdrawals be deducted from the 1,486 signers of the original petition, the remainder is 1,029, or less than the required number. In support of their contention, counsel rely with apparent confidence on the decision in *State ex rel. Lang v. Furnish*, *supra*. While they admit that the New Counties Act (Laws 1913, Chap.

133), which was under consideration in that case, contains an express provision prohibiting the filing of petitions in any form after the date set for the hearing, they insist that though section 2041, *supra*, does not contain any such express provision, yet since the order must be made "upon application by petition," the implication obtains that the petition, the basis of the order, must be complete when taken up for examination, and cannot thereafter be aided by additional signatures by way of a supplemental petition. Inasmuch as the statute does not expressly prohibit the presentation of supplemental petitions, we are not disposed to give it the force which counsel would have us give it. True, a sufficient petition is a necessary prerequisite to jurisdiction by the board to order the election. So a sufficient complaint is necessary to enable a court to grant relief in an ordinary action. This necessity does not preclude the court from permitting amendments by an addition to the pleading of omitted material allegations at any stage of the proceeding, in order to furnish a basis for the relief demanded. The statute *supra* does not provide for an adversary hearing; but assume that this is implied, it seems not out of place to make the additional assumption that the implication is equally as strong that the hearing shall be conducted according to the analogies of ordinary actions. But whether these implications are permissible or not, in view of the fact that proceedings had by a board of commissioners in such cases are always more or less informal, we can see no legal objection to the reception of supplemental petitions at any time during the course of its deliberations, until the matter is submitted for final decision. This view relieves the proceeding of all purely technical features, and at the same time requires the board to observe, and be controlled by, the substance of the application rather than its form. We know of no authority directly in point. The holding in the case of *Horton v. Botts*, 158 Ky. 11, 164 S. W. 352, cited by counsel for relator, is more nearly in accord with that in *State ex rel. Lang v. Furnish*, *supra*, in that the Kentucky court held that under a local option statute, supplemental petitions may be filed

at any time before the date set for the hearing is fixed, and not thereafter. It does lend support to the view that the petition is in the nature of a pleading, and in order to furnish the jurisdictional fact, *viz.*, a sufficient number of qualified signers, it may be amended by supplemental petitions disclosing it.

6. Counsel on both sides correctly assume that it was the duty [7] of the board to permit such of the petitioners as desired to do so to withdraw their names from the petition. (*State ex rel. Lang v. Furnish, supra.*) Counsel for the relator contend that it was also incumbent upon the board to permit those who had withdrawn to revoke their withdrawals and to be counted as petitioners. In the case last cited, after declaring the right of a signer of the petition to withdraw, this court said: "Indeed, the above rule is a necessary inference from the very nature of the right of petition, and of necessity applies, not merely to the petitions themselves, but to the withdrawals, so as to authorize the withdrawal of a withdrawal." This remark had reference to a petition for the exclusion or withdrawal of territory from a proposed county, and was intended to apply only to a withdrawal of such a petition. As is apparent from the context, it had no reference to a revocation by petitioners of a withdrawal of their names from the petition and their reinstatement as original signers. Now, it may be conceded that the right of petition from its nature implies the right of withdrawal, because, upon further discussion and more mature reflection as to the desirability of the accomplishment of the purpose sought by the petition, the petitioner may change his conviction; yet it is not readily apparent that after he has once signified to the body to whom the petition is addressed that his name is withdrawn, he has a clear legal right to revoke his withdrawal and be restored to his original position.

It was held by the court in *Horton v. Botts, supra*, that the withdrawal may be revoked at any time before it has been acted upon by the petitioned body, restoring the petitioner to his original position. It will be observed that the revocation had been permitted by the county court, and the propriety of it was

afterward drawn in question in a contest of the election ordered and held upon the basis of the petition as finally considered. The court held in effect that it was within the discretion of the county court to which the petition was addressed to pursue the course it did. In a dissenting opinion, however, Mr. Justice Hannah denied the right of withdrawal in the first place, giving his reason therefor as follows: "There is nothing obscure nor complicated about a petition for a local option election. Every man who signs such a petition knows its import. Because of that knowledge, he should not be permitted to play fast and loose with the court and with the other signers. When the petition is filed, his right to withdraw therefrom should terminate. To hold otherwise is to pervert the legislative intent to add to the statute that which it does not contain, and to open the door to treachery, corruption and fraud." We think the considerations adduced by Mr. Justice Hannah fully justify the conclusion that the right of revocation is at best not absolute, and ought not to be enforced by *mandamus*.

The judgment is reversed and the district court is directed to overrule the demurrer and motion.

Reversed and remanded.

MR. JUSTICE HOLLOWAY concurs.

MR. JUSTICE SANNER: I concur in the result; but I am not convinced that supplemental petitions and withdrawals should be considered while "withdrawals from withdrawals," so called, before the board at the same time, should be ignored. Difficulties exist in the formulation of any rule for so informal a proceeding, though the statute seems to suggest that the petition should be judged as of the date it is presented, without additions or subtractions signified after that time. If, however, the object of the proceeding is to ascertain whether the requisite proportion of the taxpaying electorate favor the purposes of the petition at the time it is finally submitted, and this is to be gleaned from the petition as aided by additions and subjected to deductions for withdrawals up to that time, it seems to me

that the withdrawals should be subject to elimination for retractions from them. Supplemental petitions, withdrawals and retractions from withdrawals are all outside the letter of the statute, and if the first two should be considered as factors in determining how many qualified petitioners remain at the time of submission, I think the third should also be considered, because the number of withdrawals can be known only by knowing how many stand to their withdrawals.

REGAN, APPELLANT, v. MONTANA LOGGING CO.,
RESPONDENT.

(No. 3,711.)

(Submitted November 27, 1916. Decided January 10, 1917.)

[162 Pac. 388.]

*Personal Injuries—Master and Servant—“Railroad”—Logging
—Statutes—Construction.*

Personal Injuries—Master and Servant—“Railroad”—Logging.

1. *Held*, that the word “railroad” as used in Chapter 29, Laws of 1911, making every person or corporation operating a railroad liable for injuries sustained by employees through the negligence of his or its officers, agents or employees while operating the road, includes a road used for logging purposes.

Same—Operation of Railroad—What Constitutes.

2. Plaintiff, a brakeman on defendant’s logging road, was also required to assist in loading and unloading cars; while doing so he was injured by the breaking of an appliance. *Held* that defendant company was “operating” its road at the time of the injury, within the meaning of Chapter 29, Laws of 1911.

Statutes—Remedial Legislation—Construction.

3. Remedial legislation should not be limited by a narrow construction.

Appeal from District Court, Missoula County; John E. Patterson, Judge.

On applicability to private railroad of statute abrogating or modifying the fellow-servant rule as to railroads, see notes in 15 L. R. A. (n. s.) 479; 45 L. R. A. (n. s.) 841.

ACTION by Joe Regan against the Montana Logging Company. Judgment for defendant on demurrer to the complaint, and plaintiff appeals. Reversed and remanded, with directions to set aside the judgment and overrule the demurrer.

Submitted on briefs of counsel.

Mr. Harry H. Parsons and Mr. Derwood Washington, for Appellant.

A logging railroad comes within the purview and meaning of Chapter 29, Laws of 1911. (*O'Rear v. Manchester Lumber Co.*, 6 Ala. App. 461, 60 South. 462; *Bissell v. Greenleaf-Johnson Lumber Co.*, 152 N. C. 123, 67 S. E. 259; *Roberson v. Greenleaf-Johnson Lumber Co.*, 154 N. C. 328, 70 S. E. 630; *Long Pole Lumber Co. v. Gross*, 180 Fed. 5, 103 C. C. A. 359; *Morgan v. Grande Ronde Lumber Co.*, 76 Or. 440, 148 Pac. 1122; *Sullivan-Sanford Lumber Co. v. Watson*, 106 Tex. 4, 155 S. W. 179; *Receivers of Kirby Lumber Co. v. Lloyd*, 103 Tex. 153, 124 S. W. 903.) In addition to the above cases, we invite attention to *Schus v. Powers-Simpson Co.*, 85 Minn. 447, 69 L. R. A. 887, 89 N. W. 68, and incidentally *Papkovich v. Oliver Iron Mining Co.*, 109 Minn. 294, 123 N. W. 824.

Was the plaintiff at the time of his injuries engaged in the handling or operation of any train or car on or over such railroad? "Operating" a railroad or a car connotes something more than the mere running or moving of the same. (*Freeman v. Shaw*, 59 Tex. Civ. App. 294, 126 S. W. 53; *Glover v. Houston etc. R. Co.* (Tex. Civ. App.), 163 S. W. 1063; *Cahill v. Illinois Cent. Ry. Co.*, 148 Iowa, 241, 28 L. R. A. (n. s.) 1121, 125 N. W. 331; *Mace v. H. A. Boedker & Co.*, 127 Iowa, 721, 104 N. W. 475; *Rhodes v. Matthews*, 67 Ind. 131; *Cumming v. Brooklyn City R. Co.*, 104 N. Y. 669, 10 N. E. 855.) "Operating" a railway does not mean alone using or moving its rolling stock; it applies to such of the works and plant as are necessary as well (*Central Trust Co. v. Condon*, 67 Fed. 84, 14 C. C. A. 314); or the running of a single engine (*Larson v. Illinois Cent.*

R. Co., 91 Iowa, 81, 58 N. W. 1076); or applies to those putting in roadbed or bridges. (*Callahan v. St. Louis Merchants etc. R. Co.*, 170 Mo. 473, 94 Am. St. Rep. 746, 60 L. R. A. 249, 71 S. W. 208; see, also, *Müller v. Minnesota etc. R. Co.*, 76 Iowa, 655, 14 Am. St. Rep. 258, 39 N. W. 188; *Ean v. Chicago, M. & St. P. R. Co.*, 95 Wis. 69, 69 N. W. 997.) The business of the defendant is alleged to have been that of lumbering and logging with its railroad. If it was operating the railroad, then of necessity must the plaintiff have been participating in the operation. He was under the charge of a foreman, a brakeman on the train, and assisting in loading the logs at the time complained of. He was assisting, in any event, in operating the train, or at least in handling the car. The operating or handling of any car has been held in *Missouri, K. & T. Ry. Co. v. Bailey*, 53 Tex. Civ. App. 295, 115 S. W. 601, to apply to even a handcar. (3 Elliott on Railroads, 1354; *San Antonio & A. P. R. Co. v. Stevens*, 37 Tex. Civ. App. 80, 83 S. W. 235; *Chicago, M. & St. P. R. Co. v. Artery*, 137 U. S. 507, 34 L. Ed. 747, 11 Sup. Ct. Rep. 129; *Kansas City etc. R. Co. v. Crocker*, 95 Ala. 412, 11 South. 262.)

Mr. Henry C. Stiff, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action for damages for personal injuries sustained by the plaintiff during the course of his employment by the defendant. The district court sustained defendant's demurrer to the complaint and rendered judgment for defendant. The plaintiff has appealed.

The defendant, Montana Logging Company, a corporation, is engaged in lumber milling and logging. It is the owner of a logging railroad with the equipments of engines, cars, and other appliances necessary to enable it to carry logs from the forest to its mill and to carry back persons and materials when occasion arises. At places where logs are loaded upon the cars, it

has provided appliances, such as chains, hooks, hoists and other devices, suitable to facilitate the work of loading. At the time of the injury the plaintiff was employed as a brakeman. It was a part of his work to assist in loading and unloading cars. He was at this time assisting in the loading of a car. The logs were placed in layers or tiers lengthwise of the car and were held in place by chains. To prevent them from spreading as the loading proceeded, the defendant had provided a device known as and called a "gin-pole." This consisted of a pole from six to eight inches in diameter, standing in a hole on the ground at the side of the car and about midway between its ends. The top of the pole was held by a chain which extended, and was fastened, to the reach of the car. The logs were loaded between the reach and the pole. As the several layers were put in place, the resistance of the gin-pole was relaxed by releasing and readjusting the chain holding it. The pole was thus held at any angle which was required in order that the load might be built to the height desired. The logs were lifted to the car by means of a hoist which was operated by an engine. They were raised, lowered or turned by means of a metal cable armed at the end with a pair of hooks or tongs which closed when the cable was drawn tight. The foreman in charge of the operations was one Fitzpatrick. The plaintiff was wholly subject to his control and directions. On the day in question, the plaintiff and other employees of defendant were working under the direction of Fitzpatrick. They had covered the deck of the car with two and one-half tiers of logs, leaving a space between these logs and the gin-pole. There was being lifted to the car a large log which it was desired to have placed in the space mentioned. This space being too narrow to receive the log, the latter rested against the gin-pole. Fitzpatrick undertook to hold the log by means of a peavy or cant-hook while the plaintiff under his direction released the chain holding the gin-pole in order to permit the log to roll in place. The plaintiff released the gin-pole, whereupon, the foreman being unable to hold the log, it rolled away and broke the gin-pole, throwing it against the

plaintiff, inflicting the injuries complained of. After reciting the foregoing facts, the complaint alleges:

“VIII. That the said gin-pole, as so placed in said hole or excavation, was wholly and altogether unable and too weak to stand the pressure of any logs, or any log, falling or rolling upon it when said chains were not taut, and said defendant, well knowing all of the facts herein mentioned and complained of, negligently failed and refused to make said hole or socket reasonably safe, and carelessly and negligently kept and maintained the said system and socket in said unsafe, negligent and insecure manner and fashion.

“IX. That there was no means save by the use of one's hands to release or slacken the ends of said chain around said gin-pole, and the defendant negligently and carelessly omitted and failed to furnish or provide plaintiff with any reasonably safe method or appliances with which to slacken, lessen, release or readjust said chain.

“X. That each and all of the acts, orders and commands herein enumerated and set forth were careless and negligent, but particularly were the defendant and said foreman negligent and careless: (1) In not holding said big log in place by the hooks and tongs while plaintiff was attempting to adjust and fasten said gin-pole; (2) in trying to hold the same in place by a cant-hook or peavy; (3) in having but one gin-pole to attempt to hold back and stand the pressure of said logs so loaded; (4) in not having the said gin-pole more deeply and securely fastened in the ground, so that the same would not give way to the pressure of one log resting or tumbling against it; (5) in giving plaintiff the said command and order to release said chain under the circumstances and situation then existing; (6) in not using reasonable care to provide and furnish plaintiff with a reasonably safe place in which to work and perform his duties at said time; (7) in not furnishing him with a reasonably safe place, means and with reasonably safe appliances with which to release and recatch the said chain in the performance of his said duties; (8) that the said gin-pole fell because of the negli-

gence aforesaid [the same], and the said log rolled and fell upon and hit the plaintiff violently, throwing him to the ground." Then follow a description of plaintiff's injuries and demand for judgment.

The demurrer was general and special. The vital questions [1] presented by the general ground of the demurrer are: Whether the road described in the complaint is a railroad within the meaning of Chapter 29 of the Laws of 1911 (sec. 1, p. 47); and, if so, whether the complaint states a cause of action under it; or, in other words, whether the car was being moved or handled at the time the plaintiff was injured. This provision declares: "Every person or corporation operating a railroad in this state shall be liable in damages to any person suffering injury while he is employed by such person or corporation so operating any such railroad, or, in case of the death of such employee, instantaneously or otherwise, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent, upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such person or corporation so operating such railroad in or about the handling, movement or operation of any train, engine or car, on or over such railroad, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

A solution of the first inquiry depends upon whether the statute includes within its scope only commercial railroads, as such, or includes also roads the primary purpose of which is use in connection with a private business or enterprise. It is evident that the purpose of the legislature in enacting it was to furnish protection to those employed in the hazardous business of operating locomotives and trains and handling cars upon roads constructed of rails, without regard to who the owner of them may be or the scope or character of the enterprise to which their use

is devoted; for the language is broad and comprehensive, without exception, expressed or implied, in the words employed in it. There is no room for the distinction suggested by counsel for defendant that the road referred to in the pleading is a mere instrumentality of the larger and principal industry of manufacturing lumber and does not come within the purview of the statute. Legislation of the same character has frequently been before the courts in other jurisdictions, and the current of authority supports the view that its scope cannot be narrowed or limited by construction to exclude any means of transportation which may be designated as a railroad. Construing a similar provision in *Morgan v. Grande Ronde Lumber Co.*, 76 Or. 440, 148 Pac. 1122, the supreme court of Oregon said: "It will be seen that the statute in its terms is broad enough to include all railroads. Its evident object is to protect employees from the dangers incident to the operation of locomotives and trains; and this danger is even greater upon logging railroads than upon those which are used as common carriers, so that there would seem no good reason to make a distinction by construction where the law has made none by its language." The following cases are in point: *Bissell v. Greenleaf-Johnson Lumber Co.*, 152 N. C. 123, 67 S. E. 259; *Sawyer v. Roanoke R. & Lumber Co.*, 145 N. C. 24, 58 S. E. 598; *Sullivan-Sanford Lumber Co. v. Watson*, 106 Tex. 4, 155 S. W. 179; *Cunningham v. Neal*, 101 Tex. 338, 15 L. R. A. (n. s.) 479, 107 S. W. 539; *Betterly v. Boyne City etc. Ry. Co.*, 158 Mich. 385, 122 N. W. 635; *Blomquist v. Great Northern Ry. Co.*, 65 Minn. 69, 67 N. W. 804; *Kline v. Minnesota Iron Co.*, 93 Minn. 63, 100 N. W. 681; s. c., *Minnesota Iron Co. v. Kline*, 199 U. S. 593, 50 L. Ed. 322, 26 Sup. Ct. Rep. 159; *Long Pole Lumber Co. v. Gross*, 180 Fed. 5, 103 C. C. A. 359.

Was the defendant, at the time the plaintiff was injured, [2] engaged in the operation of the railroad, within the meaning of the statute? The liability declared by it attaches to the owner operating a railroad, in favor of an employee injured through the negligence of any officer, agent or employee of the

owner "in or about the handling, movement or operation of any train, engine or car, on or over any such railroad, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, * * * or other equipment." If we bear in mind that the purpose of the legislation is as we have said, to protect the employees from injuries incident to the employment, the conclusion seems inevitable that the language quoted is broad enough to include an injury to one employed in any capacity by another employee in the same or a different capacity, in the accomplishment of any kind of service without which the complex process of operation cannot go on. Trains cannot be moved unless the roadbed, rolling stock, and other appliances are kept in repair. Cars must be loaded and unloaded; otherwise transportation cannot go on. Other tasks of similar nature must be done, the doing of which involves the risk of dangers peculiarly incident to railroads because of the character of the services required and the instrumentalities employed. So it is held that such a statute includes repairs to the track as a part of the process of operation (*Blomquist v. Great Northern Ry. Co.*, *supra*), the work of unloading metal crossings or frogs from a car by means of a derrick (*Glover v. Houston etc. Ry. Co.* (Tex. Civ. App.), 163 S. W. 1063), the unloading of gravel from a gravel-car (*McKnight v. Iowa & M. R. Const. Co.*, 43 Iowa, 406), the loading of dirt upon cars from a bank (*Deppe v. Chicago etc. Co.*, 36 Iowa, 52), the moving of a hand-car by section-men by hand power (*Mikesell v. Wabash R. Co.*, 134 Iowa, 736, 112 N. W. 201), the unloading of ties from a car as it was being moved from place to place by hand (*Freeman v. Shaw*, 59 Tex. Civ. App. 294, 126 S. W. 53), the coupling and uncoupling of cars (*Schus v. Powers-Simpson Co.*, 85 Minn. 447, 69 L. R. A. 887, 89 N. W. 68), the pushing of a freight-car to a freight-house by a freight handler (*Ean v. Chicago, M. & St. P. Ry. Co.*, 95 Wis. 69, 69 N. W. 997), and riding on a hand-car while it is being moved along the roadway, by hand power by section-hands returning from their work (*Chicago, M. & St. P. R. Co. v. Artery*, 137

U. S. 507, 34 L. Ed. 747, 11 Sup. Ct. Rep. 129). These are some of the instances which are held to be included within the scope of such legislation, and support the view expressed above that any part of the work connected with the railroad which necessarily and directly contributes to the operation of it, or the handling or movement of any train, engine, or car on or over it, comes within its scope.

The legislation is remedial in its nature, and its operation [3] ought not to be limited by narrow construction. Doubtless cases will arise to which the statute has no application, and recovery may be had, if at all, only under the limitations of the common-law rule. The service being performed may be so remotely connected with the process of operation that it cannot by any intendment be deemed a part of it. Each case must be determined upon its own facts. The facts alleged in the complaint we think make out a *prima facie* case of liability. The objections presented under the general ground of the demurrer should have been overruled.

The special grounds of objection urged are that the complaint is ambiguous, uncertain and unintelligible in various particulars stated. Though the pleading is not a model of clarity and succinctness in statement, it is not open to attack for vice in the particulars alleged. The district court is directed to set aside the judgment and overrule the demurrer.

Reversed and remanded.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

STATE EX REL. CARTER, APPELLANT, v. KALL, RESPONDENT.

(No. 3,709.)

(Submitted November 25, 1916. Decided January 11, 1917.)

[162 Pac. 385.]

*Intoxicating Liquors — Licenses — Collection — Statutes—Construction.***Intoxicating Liquors—When License cannot be Collected.**

1. Though a retail liquor dealer who engages in business without procuring a license may be prosecuted under the criminal law, the state cannot by civil action collect the amount of the license from one who, after refusal to issue one to him because the maximum number of licenses allowed by law in the town in which he intends to conduct a saloon has been reached, does business notwithstanding such refusal.

Statutes—Construction—Intention of Legislature.

2. In the construction of a statute the primary duty of the court is to give effect to the intention of the legislature in enacting it, which intention must be sought in the language employed and the apparent purpose to be subserved.

[As to rules for construction of statutes, see note in 12 Am. St. Rep. 826.]

Appeal from District Court, Musselshell County; Chas. L. Crum, Judge.

ACTION by the State of Montana, on the relation of E. B. Carter, against Fred Kall. Judgment for defendant and relator appeals. Affirmed.

Mr. J. B. Poindexter, Attorney General, and *Mr. John H. Alvord*, Assistant Attorney General, for Appellant, submitted a brief; *Mr. Alvord* argued the cause orally.

A state in imposing license fees may intend both regulation and revenue. (Cooley on Taxation, 3d ed., p. 1136.) It is not necessary that a license system should be employed only as a police supervision or regulation. (*Northwestern Mut. Life Ins. Co. v. Lewis & Clark County*, 28 Mont. 484, 98 Am. St. Rep. 572, 72 Pac. 982.) There is but one liquor license known and recognized by the law of Montana. (*State ex rel. Frost v. Barnett*, 49 Mont. 252, 141 Pac. 287.) It is no defense to a

prosecution for selling liquor without a license to plead that no license was obtainable. (*Welsh v. State*, 126 Ind. 71, 9 L. R. A. 664, 25 N. E. 883; *State v. Funk*, 27 Minn. 318, 7 N. W. 359; *State v. Tucker*, 45 Ark. 55; *State v. Brown*, 41 La. Ann. 771, 6 South. 638; *State v. White*, 115 La. 779, 40 South. 44.) When a license is required to carry on a certain business, it applies to all persons who engage in that business, whether it is carried on legally or illegally. (*State v. White*, *supra*; *Foster v. Speed*, 120 Tenn. 470, 15 Ann. Cas. 1066, 22 L. R. A. (n. s.) 949, 111 S. W. 925.) A license tax imposed upon a business which is unlawful is collectible. (Cooley on Taxation, 3d ed., 24; *State v. White*, *supra*; *Conwell v. Sears*, 65 Ohio St. 49, 61 N. E. 155; *License Tax Cases*, 5 Wall. (72 U. S.) 462, 18 L. Ed. 497; *Veazie Bank v. Fenno*, 8 Wall. (75 U. S.) 533, 19 L. Ed. 482; *Foster v. Speed*, *supra*.)

Messrs. Boarman & Boarman and *Messrs. Jameson & Dusenbery*, for Respondent, submitted a brief; *Mr. V. D. Dusenbery* argued the cause orally.

In the absence of express statutory authority, an action for license fee cannot be maintained where no license is taken out. (*Monterey County v. Abbott*, 77 Cal. 541, 18 Pac. 113, 20 Pac. 73; *Santa Cruz v. Santa Cruz R. Co.*, 56 Cal. 143; 25 Cyc. 629.) An action to recover a license fee under statutory authority is not an action to recover a penalty, but in the nature of a debt. (*County of San Luis Obispo v. Hendricks*, 71 Cal. 242, 11 Pac. 682; *City of Sacramento v. Dillman*, 102 Cal. 107, 36 Pac. 385; *San Luis Obispo County v. Greenberg*, 120 Cal. 300, 52 Pac. 797.) A license is a permit to do business which could not be done without the license. (*City of Sonora v. Curtin*, 137 Cal. 583, 70 Pac. 674; *Cache County v. Jensen*, 21 Utah, 207, 61 Pac. 303; 25 Cyc. 597.) A license fee is not a tax. (*State v. McKinney*, 29 Mont. 375, 1 Ann. Cas. 579, 74 Pac. 1095.) A license fee is a sum exacted for the privilege of engaging in business, while an occupation tax is levied on an existing business irrespective of the right to engage therein. (*Palmer v.*

State, 88 Tenn. 553, 8 L. R. A. 280, 13 S. W. 233; *Cache County v. Jensen*, 21 Utah, 207, 61 Pac. 303; *Youngblood v. Sexton*, 32 Mich. 406, 20 Am. Rep. 654.) Under the Montana statutes a liquor license is expressly made negotiable and transferable, and is therefore a valuable property right. (Rev. Codes, sec. 2759; *Degginger v. Seattle Brewing & Malting Co.*, 41 Wash. 385, 4 L. R. A. (n. s.) 626, 83 Pac. 898.) For the proposition that there can be no collection of license fee where the liquor traffic, once licensed, has been later prohibited, we would cite one of appellant's authorities: *State v. White*, 115 La. 779, 40 South. 44.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In the complaint in this action it is alleged that for more than six months during the year 1914 the defendant sold intoxicating liquors in the city of Roundup without having a license permitting him to do so. The prayer is for judgment for \$264, the amount required to procure a liquor license to do business for six months in a city of the class to which Roundup belongs, and for certain penalties. The answer admits all the material allegations of the complaint, and, by way of special defense, alleges that during all the times mentioned there were outstanding in full force and effect in the city of Roundup the maximum number of liquor licenses allowed by law, by reason whereof the defendant could not procure a license, and the county treasurer could not lawfully issue one to him. A motion to strike this affirmative defense was overruled, and the trial of the cause resulted in a judgment for defendant, from which this appeal is prosecuted.

The single question presented is: May the state by civil action [1] collect a license tax from one whom it refuses a license, but who nevertheless engages in business in violation of the law?

It is the general rule that, in the absence of express legislative authority an action cannot be maintained to collect a license fee where a license has not been applied for or granted. (25

Cyc. 629.) The statutes relating to the granting of licenses and the collection of license taxes are found in sections 2746-2780, Revised Codes, with certain amendments subsequently enacted which are not of consequence here. Section 2749 provides that "a license must be procured immediately before the commencement of any business or occupation liable to a license tax." Section 2750 authorizes the county treasurer to commence a civil action in the name of the state "against any person required to take out a license who fails, neglects, or refuses to take out such license or who carries on or attempts to carry on business without such license." [This is the only statute authorizing an action to collect a license tax, though counsel assume that authority is likewise granted by section 2780. The last section does nothing more than impose a penalty for doing business without a license.] Section 2752 provides that upon the trial of an action prosecuted under section 2750 the production of the license, proof that such license has been procured, or proof of the payment of the proper license tax with damages and costs shall constitute a complete defense. Section 2755 provides that all property held or used in any trade, occupation or profession for which a license is required is subject to a prior lien in favor of the state for the amount of the license tax. Section 2759 requires every person who sells or offers for sale intoxicating liquors to obtain a license from the county treasurer and to pay therefor the license tax, which is graduated according to the population of the place where the business is to be conducted.

With the enactment of the Codes in 1895 a general license statute went into effect. Under its terms almost every trade, profession and business was subjected to the payment of a license tax. There were not any restrictions upon the number of licenses which might be issued, and no question of discretion was involved. Upon the payment of the required fee the license issued as a matter of course, and unless the state was in a position to grant a license, it could not exact the license fee. The sections mentioned above were all of that general legislative scheme.

Since section 2750 is the only statute which authorizes the prosecution of a civil action to collect a license fee, the solution of the question before us is to be found in the answer to the further inquiry: What does that section mean?

In the construction of a statute the primary duty of the court [2] is to give effect to the intention of the legislature in enacting it. (*Lerch v. Missoula Brick & Tile Co.*, 45 Mont. 314, Ann. Cas. 1914A, 346, 123 Pac. 25.) The intention is to be sought in the language employed and the apparent purpose to be subserved. (*Johnson v. Butte & Superior Copper Co.*, 41 Mont. 158, 48 L. R. A. (n. s.) 938, 108 Pac. 1057.)

The language of section 2750 is that the county treasurer must direct suit in the name of the state "against any person required to take out a license who fails, neglects, or refuses to take out such license or who carries on or attempts to carry on business without such license." When the statute was enacted that language had a definite and well-understood meaning. "Any person required to take out a license" meant any person engaged in a profession, trade or occupation for which a license tax was required, and a person engaged in any such business upon the payment of the required fee could demand a license as a matter of right. When we consider the history of our license legislation and the provisions of sections 2749, 2752 and 2755, in connection with the terms of section 2750, and realize that when these statutes were enacted the licensing authorities could not refuse a license to anyone who applied for it and paid or tendered the required fee, we are driven to the conclusion that in the enactment of section 2750 the legislature intended nothing more than to provide a means for the collection of a license fee from one entitled to a license as a matter of right upon payment of the fee. Though our license statutes have been changed in many respects since 1895, there is not anything in the subsequent legislation to indicate that section 2750 should be given a different meaning from the one manifestly intended in the first instance. It cannot be said that this construction renders that section a dead letter.

It is true that under the present statutes a liquor license does not now issue as a matter of course; but a license is still required as a condition precedent to the right to engage in any one of the several other occupations, and such license can be demanded as of right by anyone who pays or tenders the required fee.

An attempt is made to distinguish between a license tax or occupation tax, on the one hand, and a license fee exacted merely for regulation purposes. Our license statutes fail to indicate the particular purpose for which they were enacted. Section 1, Article XII, of the Constitution authorizes the legislature to impose a license tax, but in *State v. Camp Sing*, 18 Mont. 128, 56 Am. St. Rep. 551, 32 L. R. A. 635, 44 Pac. 516, this court held, in effect, that it was not the intention of that provision to differentiate between the license tax, strictly so-called, and the license fee exacted in a regulatory measure, but that it was the purpose to refer the general subject of licenses to the legislature, and that under the provision in question a license tax might be imposed for revenue, for regulation, or for both purposes.

The defendant may be prosecuted under the criminal laws, but he cannot be made to pay the license fee and be denied the license—the consideration for the fee.

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

WIGHT ET AL., RESPONDENTS, v. DOLENTY, APPELLANT.

(No. 3,713.)

(Submitted November 27, 1916. Decided January 15, 1917.)

[162 Pac. 387.]

*Attorneys—Contract of Employment—Fees—Liability of Executors and Administrators.***Attorneys—Services—Liability of Executors and Administrators.**

1. As a general rule, the personal representative of an estate is individually liable for services performed by attorneys for its benefit, at his special instance and request.

Same—Fees—Liability of Estate—Evidence—Insufficiency.

2. Conceding (but not deciding) that by special agreement between an attorney and the personal representative of an estate, individual liability of the latter may be obviated, *held* that in an action to recover attorneys' fees from the executrix of an estate, the evidence was insufficient to show such an agreement.

[As to rights and duties of counsel with respect to decedents' estates, see note in *Ann. Cas.* 1913D, 654.]

Appeal from District Court, Lewis and Clark County; J. Miller Smith, Judge.

ACTION by Ira T. Wight and Chas. E. Pew against Isabel Dolenty, executrix of W. B. Dolenty, deceased. Judgment for plaintiffs and defendant appeals. Affirmed.

Mr. H. G. McIntire, for Appellant, submitted a brief and argued the cause orally.

The only question presented is whether, under the facts of the case, she can be held individually liable for the value of said services. It is not disputed that the authorities, both of this state and of most of the other states, hold, generally speaking, that services performed by attorneys for the benefit of an estate, at the instance and request of the personal representative, are individual obligations of the personal representative, and not primarily a claim against the estate. The authorities so holding are collated in the footnote to *Brown v. Quinton*, 80 Kan. 44,

On the question of liability of estate to attorney employed by personal representative, see note in 25 L. R. A. (n. s.) 72.

18 Ann. Cas. 290, 25 L. R. A. (n. s.) 71, 72, 102 Pac. 242. But we do contend that this rule is not inflexible, and that by agreement between the attorneys and the personal representative, this individual liability may be obviated, and that in the instant case such result was achieved.

“Executors are liable personally upon contracts which they attempt to make in their official capacity when they cannot bind the estate, unless they specifically contract against a personal liability.” (2 Paige on Contracts, sec. 995; *Lawson v. Cobban*, 38 Mont. 138, 99 Pac. 128; see, also, *First Nat. Bank v. Collins*, 17 Mont. 433, 437, 52 Am. St. Rep. 695, 43 Pac. 499; *State ex rel. Kelly v. Second Judicial Dist. Court*, 25 Mont. 33, 37, 63 Pac. 717; *New v. Nicoll*, 73 N. Y. 127, 29 Am. Rep. 111; *In re Kason's Estate*, 119 Cal. 489, 51 Pac. 706; *In re Kruger's Estate*, 143 Cal. 141, 76 Pac. 891; *Briggs v. Breen*, 123 Cal. 657, 56 Pac. 633, 886; 2 Woerner's American Law of Administration, sec. 356; and cases cited in note 5.)

Mr. Henry C. Smith and *Mr. Geo. W. Padbury, Jr.*, for Respondents, submitted a brief; *Mr. Chas. E. Pew*, appearing *pro se* argued the cause orally.

The executor or administrator is personally responsible for all debts contracted for attorneys' fees. (*First Nat. Bank v. Collins*, 17 Mont. 433, 52 Am. St. Rep. 695, 43 Pac. 499; *State ex rel. Kelly v. Second Judicial Dist. Court*, 25 Mont. 33, 63 Pac. 717; *Briggs v. Breen*, 123 Cal. 657, 56 Pac. 633, 886; *In re Kruger's Estate*, 143 Cal. 141, 76 Pac. 891.)

A contract, void merely because of lack of authority in one of the parties to make it, cannot be set up to prevent a recovery of compensation for lawful services lawfully rendered. In such a case the party rendering services is entitled to recover their reasonable value. (2 R. C. L. 1046.)

Whatever the provisions of a contract of hiring, it is well settled that the attorneys can, upon being discharged, immediately sue for and recover either the contract price or the reasonable value of their services. (*Carter v. Baldwin*, 95 Cal.

475, 30 Pac. 595; *Sessions v. Warwick*, 46 Wash. 165, 89 Pac. 482; *Webster v. Rhodes*, 49 Colo. 203, 112 Pac. 324; *Union Surety & G. Co. v. Tenney*, 200 Ill. 349, 65 N. E. 688; *Webb v. Trescony*, 76 Cal. 621, 18 Pac. 796; *McFarland v. Welch*, 48 Mont. 196, 136 Pac. 394; 4 Cyc. 984 (c).) Under the state of facts shown by the record, the only person who could be sued by respondents is appellant.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The plaintiffs are attorneys, and the defendant is the executrix of the last will of W. B. Dolenty, deceased. This action was brought to recover a balance alleged to be due for professional services rendered in connection with the administration of the Dolenty estate and for expenses incurred in the performance of such services. It is admitted that plaintiffs performed the services at the special instance and request of the defendant, but it is alleged "that it was understood and agreed between the plaintiffs and herself that the plaintiffs should look to, and be paid for, their said services by the said estate of W. B. Dolenty, deceased, and not by the defendant individually." This allegation was traversed by the reply. The plaintiffs prevailed in the trial court, and defendant appealed.

In his brief, counsel for appellant states that: "The only question presented is whether, under the facts of the case, she [appellant] can be held individually liable for the value of said services." Counsel concedes that it is the general rule that for [1] services performed by attorneys for the benefit of an estate, at the special instance and request of the personal representative of the estate, such personal representative is individually [2] liable; but it is insisted that the rule is not inflexible, and that by agreement between the attorneys and the personal representative, individual liability may be obviated, and that in the instant case such result was achieved.

We shall not stop to determine whether it was necessary for defendant to allege that the agreement pleaded was founded

upon an adequate consideration, or whether the parties by such an agreement could bind the Dolenty estate to pay for the services rendered. For the purposes of these appeals only, we may assume that a valid contract was pleaded. The plaintiffs made out a *prima facie* case, and the burden was upon the defendant to show that the special agreement relied upon was actually entered into.

The defendant's own testimony fails altogether to sustain the allegation of her pleading. The evidence to which our attention is directed by appellant's brief, when considered in the light most favorable to defendant, does not go further than to indicate that the parties did agree that defendant should advance money to plaintiffs from time to time, and that plaintiffs should wait for any balance due them until the conclusion of the administration; but this is not the agreement pleaded, and proof of this agreement does not tend to prove that the agreement relied upon in the answer was ever in the contemplation of the parties at any time.

Because of defendant's failure to prove the existence of the agreement pleaded, the action of the trial court in withdrawing the special defense from the jury meets with our approval. The judgment and order denying a new trial are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

FERRAT, RESPONDENT, v. ADAMSON ET AL., APPELLANTS.

(No. 3,719.)

(Submitted November 29, 1916. Decided January 22, 1917.)

[163 Pac. 112.]

***Conversion—Constables—Measure of Damages—Instructions—
Sureties—Complaint—Bill of Exceptions—Bulk Sales Law.*****Appeal and Error—Bill of Exceptions.**

1. Under section 7112, Revised Codes, any bill of exceptions settled during trial pursuant to section 6787, Revised Codes, or after trial (sec. 6788), whether used on motion for a new trial or not, may be used on appeal from a final judgment.

Principal and Surety—Official Bonds—Complaint.

2. The complaint against a surety company to recover on the official bond of a constable, in failing to state that the relationship of principal and surety existed between him and the company at the time of his alleged wrongful seizure and detention of plaintiff's chattels, did not state a cause of action, the allegation that such relationship existed at the time of filing the complaint being insufficient.

Trial—Evidence—Exceptions—Scope.

3. Where an exception to the introduction of evidence has once been saved, it is saved for all purposes unless thereafter waived.

Bulk Sales Law—When not Applicable.

4. *Held*, that pool-tables, cues and billiard-balls kept for use in a poolroom are not articles of merchandise which the Bulk Sales Law (Rev. Codes, secs. 6131–6135) was designed to cover, that Act having reference to such goods only as the merchant keeps for sale in the ordinary course of his business.

Conversion—What Constitutes.

5. The wrongful seizure and sale of personal property by a constable constitutes a conversion.

[As to what conversion of personal property is sufficient to maintain action of trover, see note in 24 Am. St. Rep. 795.]

Same—Measure of Damages—Erroneous Instruction.

6. In an action in conversion, the giving of an instruction submitting to the jury the measure of damages declared by section 6068, Revised Codes, is error, the rule thus established being inapplicable to such a case.

Same—Measure of Damages—Proper Instructions.

7. In an action in conversion, the measure of damages established by section 6071, Revised Codes, is controlling, unless special damages are pleaded and proved, in which event correct practice requires an instruction so supplementing the measure pointed out by said section as to allow such additional damages as may be warranted by the circumstances of the particular case.

Same—Trespass.

8. Every conversion of personal property implies a trespass.

On constitutionality of bulk sale legislation, see notes in 2 L. R. A. (n. s.) 331; 20 L. R. A. (n. s.) 160; L. R. A. 1915E, 917.

Same—Punitive Damages—Argumentative Instructions.

9. Where the court had adequately covered the subject of punitive damages, it was improper to give an argumentative instruction that, if defendant constable levied upon the property "in a high-handed way to oppress plaintiff" with malicious purpose, the jury could in its discretion award punitive damages.

Evidence—Hearsay.

10. Evidence of a conversation between defendant constable and the attorney for a person not a party to the action being tried was hearsay.

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

ACTION by W. D. Ferrat against James M. Adamson, as Constable of Helena Township, Lewis and Clark County, State of Montana, and another. Judgment for plaintiff and defendants appeal. Reversed and remanded.

Mr. C. A. Spaulding, Messrs. Galen & Mettler and Mr. Edward G. Toomey, for Appellants, submitted a brief; Mr. Spaulding and Mr. Albert J. Galen, argued the cause orally.

The language of section 6131, Revised Codes, is sufficiently comprehensive to embrace property such as that involved here. The term "goods" is of very extensive meaning, and is generally understood and held to mean personal estate as contradistinguished from realty. It includes every conceivable kind of personal property, as well as fixtures and machinery; indeed, every species of property which is not real estate or freehold. (20 Cyc. 1262 *et seq.*) The term "goods" used in a statute providing that no assignment of goods by way of mortgage shall be valid unless accompanied by certain prescribed conditions with reference to execution and recordation includes fixtures and machinery used in a paper-mill. (*St. Joseph Hydraulic Co. v. Wilson*, 133 Ind. 465, 33 N. E. 113.) And the term "goods, wares or merchandise" is sufficiently comprehensive to include gold coin. (*Gay's Gold*, 80 U. S. (13 Wall.) 358, 20 L. Ed. 606.) In the case of *Knapp, Stout & Co. v. McCaffrey*, 178 Ill. 107, 69 Am. St. Rep. 290, 52 N. E. 898, the supreme court of Illinois held the term "goods" to include a raft of lumber being towed down the Mississippi River. But we are not without direct

authority as to the meaning of these terms when used in a statute practically identical with ours. In the case of *Plass v. Morgan*, 36 Wash. 160, 78 Pac. 784, the question was directly presented to the supreme court of that state as to whether property used by one engaged in the business of conducting a boarding-house and restaurant came within the purview of the Bulk Sales Law of that state. It was there held that it did. (See, also, *Parham & Co. v. Potts-Thompson Liquor Co.*, 127 Ga. 303, 56 S. E. 460; *Cooney, Eckstein & Co. v. Sweat*, 133 Ga. 511, 25 L. R. A. (n. s.) 758, 66 S. E. 257; *Virginia-Carolina Chemical Co. v. Bouchelle*, 12 Ga. App. 661, 78 S. E. 51.)

The measure of damages for the conversion of personal property is declared in section 6071, Revised Codes. (*Doll v. Hennessy Mercantile Co.*, 33 Mont. 80, 81 Pac. 625; *De Palma v. Weinman*, 15 N. M. 68, 24 L. R. A. (n. s.) 423, 103 Pac. 782.)

Messrs. Carleton & Carleton, for Respondent, submitted a brief; *Mr. Frank E. Carleton* argued the cause orally.

The Bulk Sales Law is not applicable to a transfer of property such as that involved in this suit. (*Albrecht v. Cudihee*, 37 Wash. 206, 79 Pac. 628.) In *Everett Produce Co. v. Smith Bros.*, 40 Wash. 566, 111 Am. St. Rep. 979, 5 Ann. Cas. 798, 2 L. R. A. (n. s.) 331, 82 Pac. 905, the court held that the horses, wagons and harness of a livery-stable keeper were not within the provisions of the statute, and followed the decision in the *Albrecht Case, supra*. The distinction between the foregoing case and the case of *Plass v. Morgan*, 36 Wash. 160, 78 Pac. 784, cited by counsel, is clearly pointed out in the *Everett Produce Company Case. Seattle Brewing & Malting Co. v. Donofrio*, 34 Wash. 18, 74 Pac. 823, is also distinguishable. (See, also, *Gallus v. Elmer*, 193 Mass. 106, 8 Ann. Cas. 1067, 78 N. E. 772; *Nolte v. Winstanley*, 16 Ariz. 327, 145 Pac. 246; *Boise Assn. of Credit Men etc. v. Ellis*, 26 Idaho, 438, L. R. A. 1915E, 917, 144 Pac. 6.) In the case of *Lee v. Gillen & Boney*, 90 Neb. 730, 134 N. W. 278, the supreme court of Nebraska in construing the bulk sales statute of that state, held that fixtures were not in-

cluded within the terms of the Act, and cited with approval *Gallus v. Elmer*, 193 Mass. 106, 8 Ann. Cas. 1067, 78 N. E. 772; (*Marshon v. Toohey*, 38 Nev. 248, 148 Pac. 357.) In *Van Patten v. Leonard*, 55 Iowa, 520, 8 N. W. 334, it was held that the terms in a lease, "any and all goods, wares and merchandise," did not include teams and wagons used by the lessee in delivering goods to his customers, nor notes and accounts due him and kept in the building. (*Kent v. Liverpool & London Ins. Co.*, 26 Ind. 294, 89 Am. Dec. 463.) Thus it may be seen that the courts, whenever called upon to construe the terms "goods, wares or merchandise" in Bulk Sales Acts, or in contracts of lease and insurance, etc., have construed them to mean only such goods as are bought and sold again, and not permanent fixtures or accessories which remain in the store and are not offered for sale.

Upon the question of what are proper elements of damages in cases of this character, we cite *Kyd v. Cook*, 56 Neb. 71, 71 Am. St. Rep. 661, 76 N. W. 524; see, also, *City of Terre Haute v. Hudnut*, 112 Ind. 542, 13 N. E. 686; *Chandler v. Allison*, 10 Mich. 460; *Shafer v. Wilson*, 44 Md. 268; *Chapman v. Kirby*, 49 Ill. 211.

Complaint is made of instruction No. 8, relating to the awarding of exemplary damages. This instruction correctly stated the law, as is apparent from the following authorities: *Giddings v. Freedley*, 128 Fed. 355, 65 L. R. A. 327, 63 C. C. A. 85; *Cronfeldt v. Arrol*, 50 Minn. 327, 36 Am. St. Rep. 648, 52 N. W. 857. If an officer levies upon property, knowing it to be exempt, that fact may go in aggravation of damages. (*Lynd v. Pickett*, 7 Minn. 184, 82 Am. Dec. 79; *Tracy v. Swartwout*, 10 Pet. (35 U. S.) 80, 9 L. Ed. 354; 13 Cyc. 105-110, 118.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In March, 1914, J. H. Madden owned a pool-hall business, in the conduct of which he employed certain pool-tables, cues and balls, and also kept for sale small quantities of tobacco, cigars,

etc. He sold the entire property in one transaction to W. D. Ferrat without attempting to comply with the Bulk Sales Law of this state. Leo Spring, a creditor of Madden, reduced his claim to judgment, secured an execution, and placed it in the hands of J. M. Adamson, a constable. Assuming to act under the execution, Adamson seized and sold the pool-tables, cues and balls as the property of Madden. Ferrat thereupon commenced this action to recover damages and joined as a defendant the American Surety Company. Issues were framed, and the cause tried, resulting in a judgment for plaintiff, from which the defendants appealed.

ON MOTION TO STRIKE.

The verdict was returned on March 19, 1915. On the day following counsel for defendants secured an order granting them sixty days in addition to the statutory time within which to prepare and serve a proposed bill of exceptions. Ten days later the same counsel gave notice of intention to move for a new trial upon affidavits and bills of exceptions thereafter to be prepared and upon the minutes of the court. Within the time allowed for that purpose defendants presented and served a proposed bill of exceptions, and the same was settled and allowed. No further steps were taken in the new trial proceedings. Upon this appeal the record is made to consist of the notice of appeal, the judgment-roll and the bill of exceptions. Respondent has moved the court to strike the bill of exceptions from the record, upon the theory that it was prepared in aid of the new trial proceedings, and, since it was not used for that purpose, it has no place in the record.

Our Practice Act is complicated, but the complications ought not to be multiplied by construction which proceeds upon the [1] theory that it was intended to be as abstruse as it can be made. Under the Code of Civil Procedure of 1895 a bill of exceptions settled during the trial of a cause pursuant to section 1154 became a part of the judgment-roll (sec. 1196) and a part of the record on appeal from the final judgment (sec. 1736). A

bill of exceptions settled after trial pursuant to section 1155, or a statement of the case prepared under section 1173, did not become a part of the judgment-roll. If the statement of the case was *used* on motion for a new trial, it might be used on appeal from the final judgment (sec. 1736); otherwise it could not be so used. (*Harrington v. Butte & B. Min. Co.*, 35 Mont. 530, 90 Pac. 748.) It was doubtful whether a bill of exceptions settled after trial could be used on appeal from a final judgment in any event, and, apparently for the purpose of making definite that which was uncertain, section 1736 was amended in 1907 (Laws 1907, Chap. 42). The amended Act made the record on appeal from a final judgment to consist of the notice of appeal, the judgment-roll or such parts of it as might be necessary to be considered, and any bill of exceptions upon which the appellant relies. As if to leave no possible room for doubt as to what was intended, the amended Act provides further: "Any statement of the case settled after the decision of the motion for a new trial, when the motion is made upon the minutes of the court, as provided for in section 6796 (1173), or any bill of exceptions settled as provided for in section 6787 (1154) or in section 6788 (1155), or used on the motion of a new trial, may be used on appeal from a final judgment equally as upon appeal from the order granting or refusing a new trial." This language appears to be sufficiently explicit. Any bill of exceptions settled pursuant to section 1154 (6787, Rev. Codes) or section 1155 (6788, Rev. Codes), whether used on motion for a new trial or not, may be used on appeal from a final judgment.

It is contended, however, that the bill of exceptions in question was not settled under the provisions of either of those sections, but was prepared in aid of new trial proceedings under section 6796, Revised Codes. There is not anything in the record to justify this assumption. When the extension of time was secured for the purpose of preparing this bill of exceptions, the new trial proceedings had not been initiated, and there is nothing to indicate that they were then contemplated by the defeated parties. They were authorized to proceed under sec-

tion 6788, and apparently did so. The motion to strike is overruled.

ON THE MERITS.

1. Does the complaint state a cause of action against the [2] American Surety Company? That company is sued only in its capacity as surety upon the official bond of the constable, and unless it is alleged that the relationship of principal and surety existed at the time of the seizure of the property (October 15, 1914) or the sale (November 7, 1914), or at some time between those dates when the property was held wrongfully, no cause of action is stated against the company. The allegation of the complaint which seeks to fasten liability upon the company is to the effect that on January 1, 1913, Adamson gave an official bond as constable, and that the American Surety Company "is surety upon said bond." This last phrase must be construed as referable to the time when the complaint was filed, November 20, 1914. It may have been the intention of the pleader to allege that the surety company became surety on such bond on January 1, 1913, but, whatever his intention, he failed to state the fact, and even if he had succeeded in carrying his intention into effect, it would still have been insufficient; for a surety on an official bond may withdraw therefrom at any time. (Sec. 401, Rev. Codes.) To charge that the company is now—November 20, 1914—surety on such bond does not imply that it sustained that relationship at any time previously, and certainly does not imply that it was surety at the time of the alleged wrongful acts of the constable. Further discussion is foreclosed by the decision of this court in *Sawyer v. Robertson*, 11 Mont. 416, 28 Pac. 456.

The specific defect in the complaint was pointed out by objection to the introduction of any evidence, and plaintiff was given every opportunity to amend. He did amend by adding to paragraph 3 of his complaint the words "upon said bond," but with the amendment the pleading charged nothing against the surety company which was not alleged before the amendment was made.

[3] The objection to the introduction of evidence saved the

point. It was not necessary to repeat the objection every time evidence was sought to be introduced to bind the company. A point once saved is saved for all purposes, unless it is thereafter waived.

The complaint fails to state a cause of action against the surety company, and the objection to the introduction of evidence against it should have been sustained.

2. Did the pool-tables, cues and balls used in conducting the [4] pool-hall business constitute a stock, or part of a stock, of goods, wares or merchandise the sale of which is regulated by the Bulk Sales Law (Revised Codes, secs. 6131-6135)?

The title of the Act is: "An Act regulating the sale of merchandise in bulk and making provision for the protection of the creditors of the vendor." (Laws 1907, p. 373.) Nearly every state in the Union has adopted a like statute designed to accomplish the same end. The scope of these Acts has been considered in many cases, and the decided weight of authority and the better reasoning justify the conclusion that it was the legislative purpose to regulate the sale in bulk of such articles only as the merchant keeps for sale in the ordinary course of his business. (*Gallus v. Elmer*, 193 Mass. 106, 8 Ann. Cas. 1067, 78 N. E. 772; *Kolander v. Dunn*, 95 Minn. 422, 104 N. W. 371, 483; *Lee v. Gillen & Boney*, 90 Neb. 730, 134 N. W. 278; *Johnson v. Kelly*, 32 N. D. 116, 155 N. W. 683; *Muskogee etc. Grocer Co. v. Durant* (Okl.), 153 Pac. 142; *Boise Assn. of Credit Men v. Ellis*, 26 Idaho, 438, L. R. A. 1915E, 917, 144 Pac. 6; *Nolte v. Winstanley*, 16 Ariz. 327, 145 Pac. 246; *Marshon v. Toohey*, 38 Nev. 248, 148 Pac. 357; *Albrecht v. Cudihee*, 37 Wash. 206, 79 Pac. 628; *contra*, *Parham & Co. v. Potts-Thompson Liquor Co.*, 127 Ga. 303, 56 S. E. 460; *Plass v. Morgan*, 36 Wash. 160, 78 Pac. 784.)

The pool-tables, cues and balls were kept for use, but not for sale, and the transaction between Madden and Ferrat did not fall within the purview of the Bulk Sales Law.

3. The measure of damages: In seizing and selling Ferrat's [5] property to satisfy a claim against Madden, the constable

converted the property. (*Tuttle v. Hardenberg*, 15 Mont. 219, 38 Pac. 1070; *De Celles v. Casey*, 48 Mont. 568, 139 Pac. 586.) While the Code does not undertake to determine in advance the precise injury which may result from the wrongful conversion of personal property, it does establish a presumption that the damages will be measured adequately by the standard fixed by section 6071, Revised Codes. Under that section the elements to be considered are: "1. The value of the property at the time of its conversion, with the interest from that time; or, where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party; and, 2. A fair compensation for the time and money properly expended in pursuit of the property." The trial court refused to submit this measure of damages but directed the jury to find for the plaintiff, and in instruction No. 3 declared the measure of damages to be full compensation for all injuries proximately caused by the wrongful seizure and sale, including, as elements thereof, the value of the property, loss of profits, injury to credit and injury to the business by reason of its suspension consequent upon the wrongful acts of the constable as the same might appear, if at all, from the evidence.

By instruction No. 4 the jury was advised that, in determining the amount of damages to be awarded to the plaintiff, consideration should be given not only to the value of the property, but as well to the actual loss, if any, occasioned by the suspension of plaintiff's business, if the evidence disclosed that plaintiff was prevented from carrying on his business by reason of the wrongful acts of the constable.

Instruction 5 follows: "The court instructs the jury that the measure of damages in this case is the amount which will compensate the plaintiff for all the detriment or injury proximately caused by the levying upon his property and selling it, whether such damages could have been anticipated or not. That is to say, it will be your duty in this case in assessing the damages to be allowed the plaintiff to award him full and just compensa-

tion for all the injuries which the evidence satisfies your minds the plaintiff has sustained by reason of the levying upon and selling of his property described in the complaint herein.”

Instructions 3 and 4 are incongruous, and instruction 5 is [6] altogether erroneous. It declares the rule announced by section 6068, Revised Codes, but by the very terms of that section the rule is not applicable to a case of conversion. The section states the rule for determining the measure of damages in tort actions “except where otherwise expressly provided by this Code.” The succeeding sections of the same chapter—6069, 6070, 6071, 6073 and 6074—do otherwise provide for a different rule of damages for each of the special tort actions enumerated, including the action in conversion.

In enacting section 6071 the legislature evinced an in- [7] tention to establish the measure of damages for the wrongful conversion of personal property in the first instance. The presumption announced is a disputable one, and may be overcome by evidence that by reason of the peculiar circumstances surrounding the property greater or less injury results from its wrongful conversion than the statute contemplates; but in the absence of proof of such special circumstances the statutory rules govern. The plaintiff pleaded special damages, but the allegations relating thereto were traversed by the answer. We think the correct practice required the trial court to submit the statutory rules for determining the damages in the first instance, and to supplement those rules by an instruction that, if the special damages pleaded, or any of them, were proved, such damages might be allowed in addition to those contemplated by section 6071. It is no answer to say that this is an action in trespass. Every conversion of personal property implies a [8] trespass, but every trespass does not constitute a conversion.

4. The court gave instruction No. 8, as follows: “You are instructed that, if you should find that the defendant constable willfully and knowingly allowed himself to become the tool of [9] Leo Spring, the attaching plaintiff in the case of *Leo*

Spring v. J. H. Madden, or his attorney, and that their object was apparently malicious, and that an unlawful levy on plaintiff's property was made in a high-handed and oppressive way to oppress the plaintiff, then you may, in your discretion, award exemplary damages in this case against the defendant constable." By instruction 6 the court had already covered the subject of punitive damages adequately, and the purpose of instruction 8 is not apparent. As an argument to the jury it might not be objectionable, but as a statement of the law for the enlightenment of the jury it could not but fail to accomplish any useful purpose.

5. Over objection the defendant Adamson, while a witness in [10] his own behalf and on cross-examination, was compelled to detail a conversation between himself and W. D. Tipton, attorney for Spring in the action by Spring against Madden. Neither Spring nor his attorney was a party to this action, and the evidence elicited was hearsay and immaterial to the determination of any issue before the court.

The judgment is reversed and the cause is remanded for further proceedings.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

Rehearing denied February 17, 1917.

EMPIRE THEATRE CO., APPELLANT, v. CLOKE ET AL.,
RESPONDENTS.

(No. 3,707.)

(Submitted November 25, 1916. Decided January 25, 1917.)

[163 Pac. 107.]

Injunction—Labor Unions—Boycotts—Conspiracy—Constitution—Freedom of Speech—Personal Liberty—Threats—Nuisances—Appeal and Error—Obiter Dictum.

Appeal and Error—Obiter Dictum—Definition.

1. An *obiter dictum* is a gratuitous opinion which is binding upon no one.

Injunction—Constitution—Freedom of Speech.

2. Since under section 10, Article III, of the state Constitution, one may publish what he pleases, subject only for penalty for abuse of such discretion, he cannot be prevented from doing so by injunction.

Labor Unions—Right to Boycott.

3. Labor unions are lawful; they may publish and pursue a peaceful boycott against any person or enterprise deemed by them to be unfriendly, and a combination of such unions or their members cannot be deemed a conspiracy.

[As to right of nonunion employees to enjoin strike by union co-employees, see note in *Ann. Cas.* 1913D, 369.]

Same—Boycott—Threats.

4. Generally speaking, what one may lawfully do, one may give warning of an intention to do, without being chargeable with making threats.

Same—Boycott—Injunction.

5. The action of labor unions in warning the public and persons in sympathy with them, through means of a banner carried upon the streets and immediately in front of the premises of the person against whom they seek to enforce a peaceable boycott, that such person is unfair to organized labor, may not be enjoined as a threat or intimidation to others or a deprivation of personal liberty.

Same—Lawful Combinations—Conspiracy.

6. A combination to do a lawful thing by lawful means is not a conspiracy, irrespective of the character, numbers or influence of the members or the consequences which may follow.

Same—Labor Unions—Boycott—Injunction—Nuisances.

7. In a suit to enjoin labor unions from conducting a boycott against plaintiff's theater, from picketing the same by men carrying banners and dissuading patrons from entering, findings of the trial court held insufficient to warrant the issuance of a writ of injunction on the ground that the acts complained of constituted a nuisance within the meaning of section 6162, Revised Codes.

For authorities passing on the question of constitutional freedom of speech and of the press, see note in 32 L. R. A. 829.

On injunction against publishing or circulating statements relative to industrial disputes by labor unions, see note in 32 L. R. A. (n. s.) 1013.

On law as to picketing, see notes in 4 L. R. A. (n. s.) 302; 50 L. R. A. (n. s.) 412.

Appeal from District Court, Silver Bow County, in the Second Judicial District; J. M. Clements, a judge of the First District, presiding.

ACTION by the Empire Theatre Company, a corporation, against Harry Cloke, Silver Bow Trades and Labor Council, and others. From a judgment of dismissal, plaintiff appeals. Affirmed.

Messrs. Roote & Hopkins, Mr. Enos E. Allen, and Mr. William T. Pigott, of Counsel, submitted a brief; Mr. Jesse B. Roote and Mr. Pigott argued the cause orally.

Under the equity practice, irrespective of statute, voluntary unincorporated associations of the species to which the Musicians' Union and the Silver Bow Trades and Labor Council belong, may be sued for injunctive relief; nor is there a doubt that an injunction may properly go against a labor union by name, such injunction being operative to bind all its members who have notice, whether they be named as parties or not. Such was the procedure in *Lindsay & Co. v. Montana Federation of Labor*, 37 Mont. 264, 127 Am. St. Rep. 722, 18 L. R. A. (n. s.) 707, 96 Pac. 127; in *Iverson v. Dilno*, 44 Mont. 270, 119 Pac. 719; in *Rocky Mountain Bell Tel. Co. v. Montana Federation of Labor*, 156 Fed. 809; in *George Jonas Glass Co. v. Glass Bottle Blowers' Assn.*, 77 N. J. Eq. 219, 41 L. R. A. (n. s.) 445, 79 Atl. 262; in *United States v. "Old Settlers,"* 148 U. S. 427, 37 L. Ed. 509, 13 Sup. Ct. Rep. 650; in *Cotter v. Grand Lodge A. O. U. W.*, 23 Mont. 82, 57 Pac. 650; in *Eastern States Retail Lumber Dealers' Assn. v. United States*, 234 U. S. 600, L. R. A. 1915A, 788, 58 L. Ed. 1490, 34 Sup. Ct. Rep. 951; *Parkinson Co. v. Building Trades Council*, 154 Cal. 581, 16 Ann. Cas. 1165, 21 L. R. A. (n. s.) 550, 98 Pac. 1027, and in many other cases; *United States v. Coal Dealers' Assn.*, 85 Fed. 252, is directly in point. If, however, neither of the associations defendant in the case at bar should have been made a defendant by its common name, no prejudice has resulted or can ensue, for "its members

may be sued, either by joining all of them or one or more for all, where the members are so numerous that it is impracticable to bring them all in, but it is the suit of the members, not of the union. I have no doubt that an injunction may properly go against a trade union by name, and will operate to restrain all of its members who have knowledge of it." (*Allis-Chalmers Co. v. Iron Molders' Union*, 150 Fed. 155; see, also, *Consolidated Steel & Wire Co. v. Murray*, 80 Fed. 811; *American Steel & W. Co. v. Wire Drawers etc. Unions*, 90 Fed. 598; *Gorman v. Russell*, 14 Cal. 531; *Meux v. Maltby*, 2 Swan. Ch. 277; 36 Eng. Reprint, 621; 30 Cyc. 100.)

We contend that upon principle, as well as upon the authority of cases adjudged by this court, by the supreme court of the United States, and by the highest courts in Great Britain, the record here demands and necessitates that the judgment must be reversed and injunctive relief granted. Not a case has been found, so far as we know, in which any court of last resort has refused relief upon like facts. "If upon these facts, so found, the plaintiff could have no remedy against those who had thus injured him, it could hardly be said that our jurisprudence was that of a civilized community." (*Quinn v. Leathem* [1901], L. R. App. Cas. 495, 1 B. R. C. 197.) The injunction would in nowise be opposed to the doctrine declared by way of an *obiter dictum* in *Lindsay & Co. v. Montana Federation of Labor*, 37 Mont. 264, 127 Am. St. Rep. 722, 18 L. R. A. (n. s.) 707, 96 Pac. 127, to the effect that section 10 of Article III of the Constitution of Montana inhibits the court from restraining the freedom of speech. The only cases cited by this court to support its view upon that point were *Dailey v. Superior Court*, 112 Cal. 94, 53 Am. St. Rep. 160, 32 L. R. A. 273, 44 Pac. 458, and *Marx & Haas Jeans Clothing Co. v. Watson*, 168 Mo. 133, 90 Am. St. Rep. 440, 56 L. R. A. 951, 67 S. W. 391. The California case was decided in 1896. The true ground of that decision and its limited scope are evidenced by *Goldberg, Bowen & Co. v. Stablemen's Union*, 149 Cal. 429, 117 Am. St. Rep. 145, 9 Ann. Cas. 1219, 8 L. R. A. (n. s.) 460, 86 Pac. 806, decided more than ten years later. The

court there amended the decree awarding the injunction by excising so much of it as restrained defendants "from the mere expressions of an opinion at any time or place as to plaintiff and its business, which would, at the worst, consist only of slander, which could not be reached in this form of action," and affirmed the decree as amended. The *Missouri Case* was decided in 1902, and its scope has been defined by *Lohse Patent Door Co. v. Fuelle*, 215 Mo. 421, 128 Am. St. Rep. 492, 22 L. R. A. (n. s.) 607, 114 S. W. 997, 1012, decided in 1908, more than six years later, where it was said: "The question there [in the *Watson Case*] discussed was whether or not, under the Constitution, defendants in that case could be enjoined from publishing a boycott, and it was there held that he could not be so enjoined; but that is not the purpose of this suit. The clear object of this case is to prohibit the defendants from continuing the boycott in force heretofore declared, or to enjoin the defendants from declaring a threatened boycott against plaintiff's business, and not to enjoin its publication. If this boycott itself is enjoined, there would be no occasion for complaint against its publication." So in the case at bar the continuance of the unlawful boycott itself, and of the other odious and illegal acts except the publications, which respondents threaten, may be enjoined without violating the constitutional provision as interpreted by this court in the *Lindsay Case*. There could then be no publication of the nonexistent boycott.

It is further respectfully but earnestly contended that the constitutional prohibition invoked in the *Lindsay Case* was misapplied by this court. The interdiction is not directed to the courts but is addressed only to the legislature. (*Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418, 34 L. R. A. (n. s.) 874, 55 L. Ed. 797, 31 Sup. Ct. Rep. 492.) In the brief for respondent in the above case, pages 802 and 803 of 55 Lawyers' Edition of the Supreme Court Reports, will be found a long list of cases which, while not expressly deciding that similar constitutional provisions are not leveled at courts, do necessarily so decide.

No man is entitled to protection by law against competition, but he has the right to be protected against, and to be free from, wanton and malicious interference, disturbance or annoyances. Where the interference is without the justification of any legitimate interest, and is merely wanton or malicious, and would work irreparable injury, courts will grant relief by injunction to restrain the threatened repetition of such interference. (*Peek v. Northern Pac. Ry. Co.*, 51 Mont. 295, L. R. A. 1916B, 835, 152 Pac. 421; *Iverson v. Dilno*, 44 Mont. 270, 119 Pac. 719; *Martell v. White*, 185 Mass. 255, 102 Am. St. Rep. 341, 64 L. R. A. 260, 69 N. E. 1085; *Lohse Patent Door Co. v. Fuelle*, 215 Mo. 421, 128 Am. St. Rep. 492, 22 L. R. A. (n. s.) 607, 114 S. W. 997, and cases cited; *Graham v. St. Charles St. R. Co.*, 47 La. Ann. 214, 49 Am. St. Rep. 366, 27 L. R. A. 416, 16 South. 806; *Delz v. Winfree*, 80 Tex. 400, 26 Am. St. Rep. 755, 16 S. W. 111; *Ertz v. Produce Exch.*, 79 Minn. 140, 79 Am. St. Rep. 433, 48 L. R. A. 90, 81 N. W. 737; *Quinn v. Leathem*, 1 B. R. C. 197; *Matthews v. Shankland*, 25 Misc. Rep. 604, 56 N. Y. Supp. 123; *Dunshee v. Standard Oil Co.*, 152 Iowa, 618, 36 L. R. A. (n. s.) 263, 132 N. W. 371; *Tuttle v. Buck*, 107 Minn. 145, 131 Am. St. Rep. 446, 16 Ann. Cas. 807, 22 L. R. A. (n. s.) 599, 119 N. W. 946; *Wilson v. Hey*, 232 Ill. 389, 122 Am. St. Rep. 119, 13 Ann. Cas. 82, 16 L. R. A. (n. s.) 85, 83 N. E. 928; *George Jonas Glass Co. v. Glass Bottle Blowers' Assn.*, 77 N. J. Eq. 219, 41 L. R. A. (n. s.) 445, 79 Atl. 262; *Olive v. Van Patten*, 7 Tex. Civ. App. 630, 25 S. W. 428; *West Virginia Transp. Co. v. Standard Oil Co.*, 50 W. Va. 611, 88 Am. St. Rep. 895, 56 L. R. A. 804, 40 S. E. 591; *Emack v. Kane*, 34 Fed. 46; 1 Street's Foundations of Legal Liability, 353.)

Mr. J. E. Healy, for Respondents, submitted a brief; *Mr. B. K. Wheeler*, of Counsel, argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

The essential facts in this case are as follows: That the plaintiff (appellant here) is a domestic corporation engaged, since

November 20, 1914, in conducting a theater and moving-picture show on Montana Street, in the city of Butte, called the Empire Theatre, an enterprise dependent upon patronage of the public for its success; that the defendants consist of the "Musicians Mutual Union, Local No. 241, American Federation of Musicians," with all its members, not specially named, the Silver Bow Trades & Labor Council, with all its members, not specially named, and certain named persons (thirty-nine in number) sued individually and as officers and members of either the Musicians Union or the Trades & Labor Council; that the Musicians Union and the Trades & Labor Council are voluntary, unincorporated associations, the former of the character known as a labor union formed for the purpose of advancing the condition of its members, the latter a sort of central body composed of delegates from the various labor unions of Butte, the purpose of which is to give to them coherence, solidarity and concert of action, with the power and influence which flow therefrom; that the combined membership of the unions affiliated to the Trades & Labor Council is more than 1,000, and such entire membership is affected whenever that body acts, as it is authorized to do, in the ordering, prosecution and furtherance of strikes and boycotts, its activities in that behalf being binding upon all and enforced by means of fines, expulsion and other penalties; that prior to November 17, 1914, the Musicians Union made demand upon the manager of the Empire Theatre that he employ five members of said union, at a wage rate fixed by it, to play at every show or exhibition of pictures given in said theater; that this demand was refused and the union, in order to enforce compliance therewith, declared a boycott against the said theater, and caused to be, from that date until and including November 29, 1914, carried by a man in a conspicuous place on the sidewalk, immediately in front of said theater during the performances therein, a canvas banner about three by four feet in size, on each side of which was printed in large letters the words, "Notice: The Empire Theatre is unfair to organized Labor"; that for the purpose of making its boycott effective, the union

solicited and secured the co-operation of the Trades & Labor Council, so that on November 29, said union, said Trades & Labor Council, and their respective members combined to boycott the plaintiff and its business, and thus to prevent it from securing sufficient patronage to successfully carry on the same unless it would yield to said demand; that in furtherance of such combination the said Trades & Labor Council did, on November 29, 1914, order and declare such boycott, and have caused the banner above mentioned to be carried in a conspicuous place, immediately in front of the Empire Theatre and within eight or ten feet of and in front of the entrance thereto every day since the twenty-ninth day of November, 1914, on which a show or exhibition of any kind was produced therein, and have also, on almost every day since November 29, 1914, publicly announced and openly published orally to the public in general in Butte that persons who patronized said theater would be regarded by the labor unions of Butte as unfair to organized labor and have also caused, on every day since November 29, 1914, and until the service of the restraining order herein, one or more men to stand on and walk along the street in front of and near the Empire Theatre to say, and who did say, to persons about to enter said theater and desiring to do so, that the said theater was unfair to organized labor, and to request, and who did request, such persons not to patronize the same; that these things were intended and done by the defendants and understood by the public as a threat that all persons patronizing the said Empire Theatre would be regarded by the defendants as unfair to union labor, would be listed as such, and would be compelled to pay money to the said union as a penalty, or else be themselves boycotted by the respondents; and the respondents propose to continue these acts, save as prevented or restrained by order of court; that the result of these acts has been to prevent many thousands of persons, desiring to patronize said theater, from doing so, to irritate, annoy and vex the plaintiff and its employees, to prevent the profitable conduct of plaintiff's business

and almost destroy the same, and to cause the plaintiff great, irreparable and incalculable damage.

Upon these facts, as alleged with much elaboration, the plaintiff sought a decree, perpetually enjoining the defendants and all persons acting for or under them, or any of them, "from further continuing any of the acts" above referred to, "from further boycotting the plaintiff and its business," "from boycotting any person who may hereafter patronize the said Empire Theatre," and "from in any manner interfering with the business of the plaintiff or with any of the employees of the plaintiff in the discharge of their duties"; but the trial court, though finding the facts to be substantially as above stated, held the plaintiff not entitled to any relief, and entered a judgment of dismissal, from which this appeal was taken.

The denial of any relief was expressly based upon the prior decisions of this court in *Lindsay & Co. v. Montana Federation of Labor, etc.*, 37 Mont. 264, 127 Am. St. Rep. 722, 18 L. R. A. (n. s.) 707, 96 Pac. 127, and *Iverson v. Dilno*, 44 Mont. 270, 119 Pac. 719, and the plaintiff, contending that the second part of the Lindsay opinion is *obiter*, insists that so much of both decisions as are really effective, as well as the later case of *Peek v. Northern Pacific Ry. Co.*, 51 Mont. 295, L. R. A. 1916B, 835, 152 Pac. 421, command, upon the facts found, a result exactly opposite.

The portion of the Lindsay opinion asserted to be *obiter* holds that injunction does not lie to restrain the publication of a circular denouncing an enterprise as unfair to organized labor, whether such publication emanate from one or from many persons, a conclusion which is assailed as altogether wrong. Considering how that case was presented, we cannot regard the part referred to as *obiter*. A comprehensive injunctive decree had been entered in the court below, which the respondents sought to sustain upon two contentions, *viz.*, that the boycott was itself unlawful, but that, if lawful, news of it could not be conveyed by circulars scattered broadcast and so phrased as to invite or advise all union men and their sympathizers to withhold their

patronage from Lindsay & Co., and from anyone else who patronized that concern. Obviously the matter could not be settled by deciding, as was done, that a boycott could lawfully be declared, but it became necessary to say whether the publication of it in the manner stated could be enjoined. The answer, necessarily negative, might have been put upon a different, and possibly better, ground than the one chosen; but this does not affect the decisional character of the answer itself or of the ground assigned for it. (*Clark v. Thomas*, 4 Heisk. (51 Tenn.) 419, 421.)

[1] “An *obiter dictum* is a gratuitous opinion, an individual impertinence which, whether it be wise or foolish, right or wrong, bindeth none—not even the lips that utter it.” The second portion of the Lindsay opinion does not come within this definition.

Counsel urge, however, that the conclusion is unsound because [2] the constitutional provision postulated as the basis of it (State Const., Art. III, sec. 10) is addressed to the legislature and not to the courts, because it in some way interferes with the power of courts of equity in cases of nuisance, and because it is contrary to the stand repeatedly taken by the supreme and other courts of the United States. The answer is not difficult. This court founded its decision upon the language of the provision above cited, which not only forbids the passage of any law impairing the freedom of speech—as does the national Constitution—but which also proclaims—as the national Constitution does not—that “every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty.” We thought, as we still think, that this second clause of our provision conveys the idea of liberty, unchecked as to what may be published, by anything save penalty, and is therefore so material a departure from the meaning given to the national provision that the federal cases have little, if any, significance; and we were, as we still are, unable to conceive how anyone can possess the right to publish what he pleases, subject only to penalty for abuse, and at the same time be prevented by any court from doing so. It is to be remembered, however, that this court was dealing in the *Lindsay Case* with

the right to publish at large, not with the propriety of enjoining acts which, though they be in aid of the right to publish, are brought, or sought to be brought, within the category of nuisances. That subject was considered somewhat in the *Dilno Case* and will be referred to later in this opinion.

So premising, we come to the result common to both the *Lind-*
[3] *say* and *Dilno Cases*, which is to declare that labor unions are not unlawful in this state; that such unions may publish and pursue a peaceful boycott against any person or enterprise deemed by them to be unfriendly, and that a combination of such unions or their members for such purposes cannot be viewed as a conspiracy. Attention is called to the emphasis laid in the *Dilno Case* upon the want of an allegation that the publication there considered, to-wit, a banner, veiled a threat, whereas the findings here establish that the acts of the defendants did convey, and were intended to convey, a threat; and from this it is deduced that the combination of the defendants became indeed a powerful and far-reaching conspiracy. The force of this depends upon what is meant by the term "threat," or, to put it in another way, upon what is threatened. Generally
[4] speaking, what one may do in a certain event, one may give warning of an intention to do in that event; and such a warning is not a threat in the legal sense, whatever may be implied by the term in colloquial usage. (*Payne v. Western etc. Ry. Co.*, 13 Lea (81 Tenn.), 507, 49 Am. Rep. 666, 674; Holmes, J., in *Vegelahn v. Guntner*, 167 Mass. 92, 107, 57 Am. St. Rep.
[5, 6] 443, 35 L. R. A. 722, 44 N. E. 1077.) What, then, was the "threat" conveyed by the acts of the defendants according to the findings? In the last analysis it was that all those who patronized the theater in defiance of the boycott would themselves be classed as unfriendly and subjected to boycott in their turn, a warning similar to that conveyed by the Lindsay circular, implicit in the *Dilno* banner, and necessarily involved in every earnest boycott. We realize that many courts treat this as a threat in the legal sense because of the power of numbers behind it, and have enjoined the execution of it upon the assump-

tion that the person boycotted is, through the intimidation of others, deprived of something to which he has a vested right. As we see it, this position is unwarranted in every particular. There is no intimidation in the legal sense unless there is a threat in the legal sense. Every person has the right, singly and in combination with others, to deal or refuse to deal with whom he chooses; to reach his decision in that, as in all other matters, upon or without good reason; to regard as unfriendly all those who, with or without justification, refuse to co-operate or sympathize. These rights do not depend upon the character, numbers or influence of those who seek to exercise them; nor upon the occasion for their exercise; nor upon the consequences which may follow from their legitimate use. They have been recognized by this court as existing in an incorporated railway benefit society (*Peek v. Northern Pac. Ry. Co., supra*), and it may be said in passing that they likewise belong to merchants' associations, to consumers interested in the cost of living, and, in some measure, to all other persons or groups of persons by whom a boycott may be conceived and practiced. The defendants had these rights, and, having them, could lawfully announce their intention to assert them. The plaintiff, on the other hand, has no vested right in the patronage of the defendants, or of anyone else who may choose to withhold it; and, no more than the plaintiff, have the persons who may choose to patronize it any vested right to such patronage. Such persons may take such patronage on the terms imposed, or not, as they see fit, just as the defendants and their friends may, if they see fit, choose to regard a rejection of these terms as a rejection of their patronage. In short, the "threat" conveyed was to do what the defendants lawfully could do—a mere warning of their intention, which they could lawfully give. (Cooke on Combinations, Monopolies and Labor Unions, secs. 77, *et cit.*) A combination to do a lawful thing by lawful means is no conspiracy. Counsel for plaintiff point to the occasion for this boycott, and eloquently denounce the effrontery of labor unions in dictating to those who are not held to them by any ties as offensive and as dangerous

to our most precious heritage, personal liberty. Offensive such dictation must certainly be, but not more offensive nor more dangerous, we think, than when the like is put forward by agencies of quite a different character. Attempted dictation, more or less disguised, is ever present; but it is not, in contemplation of the law, an invasion of liberty so long as it amounts to nothing more than a demand which one party has a legal right to make, upon the alternative of its displeasure, and the other the legal right to refuse, braving that displeasure. We see nothing in the *Peek Case* to interfere with the conclusions announced in the *Lindsay* and *Dilno Cases*, but much to confirm them, and we are satisfied that these cases correctly apply the law to present-day conditions. It follows that the judgment must be upheld so far as the boycott and its publication at large are concerned.

The plaintiff insists, however, that certain features of defendants' program as heretofore pursued and as proposed to be continued are subject to restraint as a nuisance. The defendants, contesting this, rely upon the provisions of subdivision 8, section 6121, Revised Codes, in conjunction with their right to use the streets and to publish what they will. The provision referred to is as follows: "An injunction cannot be granted: * * * In labor disputes under any other or different circumstances or conditions, than if the controversy were of another or different character, or between parties neither * * * of whom were laborers or interested in labor questions." (Thirteenth Session Laws, p. 28.) Touching this provision, we may say that it adds nothing to the pre-existing law, since there never has been, in theory at least, one rule for the wage-earner and another for the rest of the community; yet it must be taken as an expression by the legislature of the belief that injunctions have been granted in labor disputes when, under exactly similar conditions, they would not have been granted in controversies of a different character, and of an intention to forestall the possibility of such a happening in this state. So the propriety of an injunction here depends upon whether an injunction would be granted if the acts proposed were to be done by an associa-

tion of a different sort, as, for instance, a combination of merchants or consumers. To determine this the rights above mentioned are not entirely adequate. The right to publish what one pleases does not mean that one may always publish when and where he pleases; nor does his right to use the public streets imply that he may do entirely as he sees fit anywhere upon those streets. These are rights which, like all others, must be exercised with reference to the same or similar rights of one's neighbor as well as to certain public considerations. They are neither more nor less sacred than the right to possess property or the right to the free exercise of religious worship. Under the former, one may maintain a slaughter-house or a boiler factory, but not where such maintenance would constitute a nuisance; under the latter, the most saintly evangelist might be prevented from selecting as the place of his revival the front door of a cathedral or a synagogue. Similarly we think it entirely possible for a state of facts to exist under which the right to speak or publish might be so used as to constitute a nuisance and be restrained as such.

The difficulty here is that the facts found do not warrant application of the nuisance theory. In the *Dilno Case* we intimated that the acts of a single individual whose business it was to take his stand before one's door and there display a banner denouncing the owner as unfair, and thus, as well as by word of mouth, to dissuade others from entering, might constitute a nuisance, depending on whether they fall within the meaning of section 6162, Revised Codes. By this section, an act or thing to be a nuisance must be either: (a) Injurious to health; or (b) indecent or offensive to the senses; or (c) an obstruction to the free use of property so as to substantially interfere with the comfortable enjoyment of life or property; or (d) an unlawful obstruction to the free passage or use, in the customary manner, of any navigable lake, etc., or public park or street, etc. Manifestly there was nothing injurious to health, or indecent, or offensive to the senses in what the defendants did, nor does the court in terms declare that what they did, created any ob-

struction to the free use by the plaintiff of its property or its right of access thereto. Does the inference of such obstruction follow from the facts found? We think not. The findings on this subject are: (1) That since November 29, 1914, the defendants have caused the banner to be carried in a conspicuous place immediately in front of the theater, and within eight or ten feet of the entrance on every day a show was given therein. In other words, the banner was carried at the place named at some time during each performance day—whether during the performance, whether once, twice, occasionally, many times or constantly is not stated—yet the defendants might have caused their banner to be carried upon and through every street in the city of Butte, passing or even occasionally stopping before the plaintiff's theater, without at all obstructing the free use thereof or free access thereto. (2) On almost every day since November 29, 1914, they publicly announced and openly published orally to the public in general in Butte that persons who patronized the theater would be regarded as unfair to organized labor, and caused one or more men to stand upon and walk along the street in front of and near the Empire Theatre to say, and who did say, to persons who desired and were about to enter it, that it was unfair to organized labor, and to request, and who did request, such persons not to patronize the same. How long, how often, at what time or times on each day such man, or men, so stood, how many there were at any time, how near they were when not in front, whether they there dissuaded few or many persons from patronizing the theater, cannot be determined; yet, as against any right of the plaintiff to prevent, the defendants could "publicly announce" and "openly publish" orally, or in all the prints of Montana, what it is found they did announce and publish, and could, without committing a nuisance to the plaintiff, stop every person in the city and communicate their message, so long as they did not take their stand in the immediate vicinity of the theater and there demean themselves so as to create an obstruction to the plaintiff's free use of its property or an obstruction of the streets as a means of access thereto.

(3) According to the plaintiff's brief, the court also found that the men carrying the banner interfered with and unlawfully laid hands on many persons desiring to patronize the theater, thereby intimidating and dissuading vast numbers of persons from entering the same. We cannot discover any such finding, and do not infer it from what is said of paragraph 6 of the complaint; the idea presented throughout the decision below is that no physical violence or intimidation occurred. (4) According to the plaintiff's brief, the court also found that the defendants have picketed the theater with the banner carriers to dissuade persons from entering it. This is a deduction from the fact that the court negatives the allegations of paragraph 6 of the complaint that there were pickets in addition to the banner bearers, but affirms the allegations of paragraph 12 that the defendants "have picketed the plaintiff's said place of business as hereinbefore alleged," and propose to continue so to do. The soundness of this deduction is not clear, since the only picketing "hereinbefore alleged" was by pickets other than the banner bearers as set out in paragraph 6 of the complaint. But if we accept the deduction, it adds nothing to the case, since it does not appear that the "picketing" done by the banner bearers consisted of anything more than the acts already ascribed to them by the findings, which acts as we have seen were neither wrongful in themselves nor a nuisance. (5) In consequence of all the acts complained of—those which are and those which are not supposed to constitute a nuisance—many persons were prevented from patronizing the plaintiff; vexation and annoyance were caused to it and its employees; great and irreparable damage was done to its business. How much or whether any substantial part, of this result was due to those acts supposed to constitute a nuisance is not disclosed, and cannot be gathered from the fact that such loss or annoyance occurred; nor can such loss or annoyance alone give color to the acts. Unless the things done constitute a nuisance as defined by our Code, prevention is out of the question, no matter what loss or annoyance ensued. The evidence is not before us, but, from the findings as well as from

the legal reflections of the trial judge, it is apparent that the nuisance feature of the case had as little value in the district court as we must give it here.

In view of the foregoing, discussion of the question of parties is unnecessary.

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

Rehearing denied February 19, 1917.

WALSH, APPELLANT, v. HOSKINS ET AL., DEFENDANTS;
MONTANA COAL & IRON CO., RESPONDENT.

(No. 3,725.)

(Submitted November 27, 1916. Decided January 26, 1917.)

[162 Pac. 960.]

*Attorney and Client—Attorney's Lien—Notice—Laches—
Appeal and Error—Law of Case—Findings—Equity—Power
of Supreme Court.*

Appeal and Error—Law of the Case.

1. To the extent that the facts presented upon the retrial of a cause were before the supreme court on a previous appeal, its decision then made was the law of the case, binding alike upon the trial and appellate courts.

Trial—Immaterial Findings.

2. A finding not responsive to any issue involved in the case is immaterial.

Attorney and Client—Attorney's Lien—Notice.

3. Section 6422, Revised Codes, giving an attorney a lien upon his client's cause of action, is notice to the world; hence the attorney is not required to give notice.

Same—Settlement—Complaint—Findings—Immateriality.

4. Since, under section 6422, Revised Codes, an attorney's lien cannot be affected by any settlement between the parties before or after judgment, a finding in an action by an attorney on such a lien, that defendant had no intention to defeat the lien by making final payment,

under a contract of sale in a bank other than the one fixed therein, was immaterial, as was also an allegation in the complaint that they had such intention.

Equity—Appeal—Findings—Power of Supreme Court.

5. In an equity suit in which the evidence is all before the supreme court, it may, under section 6253, Revised Codes, determine a fact on which the trial court failed to make a finding.

Attorney and Client—Attorney's Lien—Assertion, When.

6. An attorney may, independently of his client, assert his lien prior to judgment or settlement.

[As to lien of attorneys, see note in 51 Am. St. Rep. 251.]

Same—Assertion of Lien—Laches.

7. An attorney who acted promptly in asserting his lien upon discovery of a violation of a settlement agreement relative to litigation conducted by him, under the terms of which all moneys were to be and were paid into a home bank to the credit of his clients, except the last installment which, contrary to the agreement, was placed in a bank outside the state, was not chargeable with laches.

Same—Settlement—Assignees—Notice of Lien.

8. Though, as between attorney and client, the latter controls the course of litigation, including its settlement, the parties making the settlement, as well as their assignees, are chargeable with notice of the former's statutory lien.

Appeal from District Court, Yellowstone County; Geo. W. Pierson, Judge.

ACTION by James A. Walsh against Omar and Maggie Hoskins, and the Montana Coal & Iron Company. From a judgment for the answering defendant corporation and an order denying his motion for new trial, plaintiff appeals. Reversed and cause remanded, with directions.

Mr. Jas. A. Walsh, pro se, and Mr. Wm. T. Pigott, of Counsel, submitted a brief in behalf of Appellant; Mr. Walsh argued the cause orally.

Under section 6422, Revised Codes, plaintiff had a lien on the two causes of action, and on any verdict, decision or judgment, and the proceeds thereof, into whosoever hands they might come, which could not be affected by any settlement between the parties. (*Coombe v. Knox*, 28 Mont. 202, 72 Pac. 641; *Gilchrist v. Hore*, 34 Mont. 443, 87 Pac. 443; *Oishei v. Metropolitan Street Ry. Co.*, 110 App. Div. 709, 97 N. Y. Supp. 447; *Fischer-Hansen v. Brooklyn Heights R. Co.*, 173 N. Y. 492, 66 N. E. 395; *Rachels*

v. *Doniphan Lumber Co.*, 98 Ark. 529, 136 S. W. 658; *Smoot v. Shy*, 159 Mo. App. 126, 139 S. W. 239; *Fillmore v. Wells*, 10 Colo. 228, 3 Am. St. Rep. 567, 15 Pac. 343; *Strohecker v. Irvine*, 76 Ga. 639, 2 Am. St. Rep. 62; *Hobson v. Watson*, 34 Me. 20, 56 Am. Dec. 632; *Weed Sewing Mach. Co. v. Boutelle*, 56 Vt. 570, 48 Am. Rep. 821; *Porter v. Hanson*, 36 Ark. 591, 604.)

The conclusion of law that plaintiff's lien could never attach to any specific property is unsupported by evidence, and unsustained by any authority. If the land had been recovered, the lien would attach to the land. (*Grant v. Lookout Mountain Co.*, 93 Tenn. 691, 27 L. R. A. 98, 28 S. W. 90; *Boring v. Jobe* (Tenn. Ch.), 53 S. W. 763; *Hill v. Hill* (Tenn. Ch.), 62 S. W. 209; *Loofbourow v. Hicks*, 24 Utah, 49, 55 L. R. A. 874, 66 Pac. 602; *Fillmore v. Wells*, 10 Colo. 228, 3 Am. St. Rep. 567, 15 Pac. 343; *McCain v. Portis*, 42 Ark. 402; *McLean v. Lerch*, 105 Tenn. 693, 58 S. W. 640; *Fitzgerald's Ex'x v. Irby*, 99 Va. 81, 37 S. E. 777; *McIntosh v. Bach*, 110 Ky. 701, 62 S. W. 515.)

Our Code does not require any notice to be given or filed to protect the lien. It is a statutory lien of which the world must take notice. (*Oishei v. Metropolitan St. Ry. Co.*, *supra*; *Wait v. Atchison, T. & S. F. R. Co.*, 204 Mo. 491, 103 S. W. 60; *Whitwell v. City of Aurora*, 139 Mo. App. 597, 123 S. W. 1045; *Brown v. Morgan*, 163 Fed. 395; *Taylor v. St. Louis Transit Co.*, 198 Mo. 715, 97 S. W. 155.)

The court may foreclose a lien, and award judgment against the defendant, Montana Coal & Iron Company, for a deficiency. (*Oishei v. Pennsylvania R. Co.*, 117 App. Div. 110, 102 N. Y. Supp. 368, 191 N. Y. 544, 85 N. E. 1113; *Carter v. Chicago, B. & Q. R. Co.*, 136 Mo. App. 719, 119 S. W. 35; *Farmer v. Stillwater Water Co. (In re Nethaway)*, 108 Minn. 41, 121 N. W. 418; *Northrup v. Hayward*, 102 Minn. 307, 12 Ann. Cas. 341, 113 N. W. 701; *Barthell v. Chicago, M. & St. P. R. Co.*, 138 Iowa, 688, 116 N. W. 813.) Hence the defendant, Montana Coal & Iron Company, is personally responsible for the amount of plaintiff's fee.

The respondent Smith or Moss could not, by any agreement with the Hoskins, by settling with them, changing the agreement deposited in the bank, paying the money at Portland, or other act, without the consent of the plaintiff, defeat plaintiff's lien upon the proceeds of the causes of action and the papers deposited in the bank. (*Lovett v. Moore*, 98 Ga. 158, 26 S. E. 498; *Fry v. Calder*, 74 Ga. 7; *Bent v. Lipscomb*, 45 W. Va. 183, 72 Am. St. Rep. 815, 31 S. E. 907; *Hubble v. Dunlap*, 101 Ky. 419, 41 S. W. 432; *Davidson v. Board of Commrs.*, 26 Colo. 549, 59 Pac. 46; *Lee v. Vacuum Oil Co.*, 126 N. Y. 579, 27 N. E. 1018; *Stearns v. Wollenberg*, 51 Or. 88, 14 L. R. A. (n. s.) 1095, 92 Pac. 1079; *Cain v. Hockensmith, W. & Car Co.*, 157 Fed. 992; *Meighan v. American Grass Twine Co.*, 154 Fed. 346, 83 C. C. A. 124.)

Messrs. Goddard & Clark and *Messrs. Johnston & Coleman*, for Respondent, submitted a brief; *Mr. O. F. Goddard* argued the cause orally.

While an attorney's lien attaches from the commencement of the action to the cause of action and to the resulting verdict, judgment, decree, etc., it is not such a right as an attorney can assert independent of his client prior to judgment or settlement. The attorney cannot, against the will of the client, control the litigation, or interfere with the settlement thereof. The right of the attorney is derived from and through his client, and must be a part of the right of the client. (*Lee v. Vacuum Oil Co.*, 126 N. Y. 579, 27 N. E. 1018; *Peri v. New York Cent. etc. R. Co.*, 152 N. Y. 521, 46 N. E. 849; *Fischer-Hansen v. Brooklyn Heights R. Co.*, 173 N. Y. 492, 66 N. E. 395; *Schoenherr v. Van Meter*, 215 N. Y. 548, 109 N. E. 625; *In re Meighan*, 106 App. Div. 599, 94 N. Y. Supp. 1153, 182 N. Y. 558, 75 N. E. 1131; *Laughlin v. Excelsior Powder Mfg. Co.*, 153 Mo. App. 508, 134 S. W. 116.)

Counsel make the statement that, independent of the statute, an attorney has a lien upon all papers belonging to his client that come into his hands during his employment. This is true,

but there can be no question that this possessory lien continues only while the attorney maintains possession thereof. (*Gottstein v. Harrington*, 25 Wash. 508, 65 Pac. 753; 4 Cyc. 1012 (c.); 3 Am. & Eng. Ency. of Law, 2d ed., 456; 2 R. C. L., p. 1067.)

Where there is a settlement of a claim in litigation before judgment, the client receiving consideration therefor, the opposing party, by the settlement, recognizes the claim and becomes personally liable to the attorney to the extent of his interest, and payments made to the client without the consent of the attorney are made at the peril of the one making the payment. (*Fischer-Hansen v. Brooklyn Heights R. Co.*, *supra*; *Smoot v. Shy*, 159 Mo. App. 126, 139 S. W. 239; *Dreiband v. Candler*, 166 Mich. 49, 131 N. W. 129.)

An attorney may by his words, acts or conduct, waive his lien and estop himself from claiming the same. (*Fillmore v. Wells*, 10 Colo. 220, 3 Am. St. Rep. 567, 15 Pac. 343; *McClare v. Lockard*, 121 N. Y. 308, 24 N. E. 453; *Hektograph Co. v. Fournal*, 11 Fed. 844; *Barnabee v. Holmes*, 115 Iowa, 581, 88 N. W. 1098; *West v. Bacon*, 164 N. Y. 425, 58 N. E. 522; *Winans v. Grable*, 18 S. D. 182, 99 N. W. 1110; *German v. Browne*, 137 Ala. 429, 34 South. 985; *Fargo v. Paul*, 35 Misc. Rep. 568, 72 N. Y. Supp. 21; *Cantrell v. Ford* (Tenn. Ch.), 46 S. W. 581; *Renick v. Ludington*, 16 W. Va. 378; *Whitehead v. Jessup*, 7 Colo. App. 460, 43 Pac. 1042; *Fulton v. Harrington*, 7 Houst. (Del.) 182, 30 Atl. 856.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This cause was before this court on a former appeal. (*Walsh v. Hoskins*, 46 Mont. 356, 128 Pac. 589.) We held that the complaint states a cause of action and remanded the case for further proceedings. There was no personal service upon, or appearance by, Omar or Maggie Hoskins. The defendant Montana Coal & Iron Company answered, admitting some of the allegations of the complaint and denying others. The trial re-

sulted in a judgment for the answering defendant, and plaintiff appeals. A statement of the case precedes our former opinion, and need not be repeated here.

To the extent that the facts presented to the lower court [1] were before this court on the former appeal, our former decision became the law of the case, binding alike upon this court and the court below. (*Davenport v. Kleinschmidt*, 8 Mont. 467, 20 Pac. 823; *Neary v. Northern Pac. R. Co.*, 41 Mont. 480, 110 Pac. 226.) In determining that the complaint states a cause of action, we considered the following allegations: That plaintiff, an attorney at law, was employed by Omar Hoskins to commence an action in the district court against the Montana Coal & Iron Company and others, the character of the action being set forth fully; that he was also employed by Omar and Maggie Hoskins to commence an action against Elijah Smith and the Montana Coal & Iron Company, the character of that action being likewise set forth in detail; that plaintiff commenced both actions and performed a great amount of work in connection therewith; that thereafter a settlement was effected between Omar Hoskins and Maggie Hoskins, on the one part, and P. B. Moss representing Elijah Smith and the Montana Coal & Iron Company, on the other, by the terms of which the shares of stock in the Montana Coal & Iron Company owned by Omar Hoskins were to be sold to Moss, and the two causes of action assigned to him for a consideration named and to be paid according to the settlement agreement; that the necessary documents were prepared by plaintiff to carry the agreements into effect; that these documents, consisting of the settlement agreement, the certificate of stock duly indorsed, and the assignments of the causes of action duly executed, were placed in escrow with the Farmers & Traders' State Bank of Billings, to be delivered to Moss or his assigns upon the payment of the stipulated price according to the terms of the contract; that thereafter Moss transferred all his interest to Smith and the Montana Coal & Iron Company; that it was agreed between plaintiff and Omar and Maggie Hoskins that for the services rendered by

plaintiff he should receive \$3,000; \$2,000 was paid, and the balance remains due and unpaid; that the payment of the last installment to Omar and Maggie Hoskins was not made according to agreement, but was made to them directly at Portland, Oregon, without the knowledge or consent of plaintiff and for the purpose of defeating plaintiff's claim for the balance due him and his lien to secure the same.

The trial court made eleven findings of fact as follows: (1) That plaintiff is an attorney, and that defendant Montana Coal & Iron Company is a corporation; (2) that plaintiff was employed by Omar Hoskins to commence the action against the Montana Coal & Iron Company and others, and did commence such action substantially as alleged in the complaint; (3) that plaintiff was also employed by Omar and Maggie Hoskins to commence the action against Elijah Smith and the Montana Coal & Iron Company as alleged, and that the settlement pleaded was effected; (4) that in the settlement plaintiff represented himself and Omar and Maggie Hoskins, and prepared the documents to be used in the settlement, that \$3,000 of the settlement price was paid as alleged, and of this sum plaintiff received \$2,000, and that the documents to be used in the settlement were by plaintiff and Moss deposited with the bank in escrow; (5) that plaintiff and Omar and Maggie Hoskins agreed upon plaintiff's compensation as alleged in the complaint; (6) that there is a balance of \$1,000, with interest, due plaintiff; (7) that plaintiff has not performed any further services in relation to either action commenced by him for Omar and Maggie Hoskins, and the Montana Coal & Iron Company caused said actions to be dismissed; (8) that Moss transferred his interest in the settlement agreement to Elijah Smith, who transferred to the Montana Coal & Iron Company, that full payment of the settlement price has been made to Omar and Maggie Hoskins, that the last installment was paid by Elijah Smith to Omar and Maggie Hoskins at Portland, Oregon, and was accepted by them as full performance of the settlement agreement, that prior to the commencement of this action plaintiff

failed to notify Moss, Smith or the Montana Coal & Iron Company that he claimed any interest in the settlement agreement or would be affected by its performance or nonperformance, or that any portion of his compensation was due or unpaid, and that he failed to notify the bank until April 17, 1911, that said persons and corporations were ignorant of any interest or claim on the part of plaintiff, "and plaintiff by his conduct led them to believe that he had no interest therein"; (9) that for the purpose of carrying into effect the settlement agreement Omar and Maggie Hoskins agreed to the deposit of the documents with the bank, to be delivered to Moss upon the payment of the stipulated price, giving Moss the privilege to deposit the amount of the price in the bank to the credit of Omar and Maggie Hoskins; (10) that, so far as Moss, Smith and the Montana Coal & Iron Company are concerned, the payment of the final installment in Portland was not made to defeat plaintiff's lien or to prevent him from recovering any balance due him; (11) "that no part of the capital stock of the Montana Coal & Iron Company was ever the subject of litigation in the causes of action brought by plaintiff for Omar Hoskins or Maggie Hoskins."

From those facts the court drew these conclusions: "That the action brought by Maggie Hoskins was for the recovery of money only; that the action commenced by Omar Hoskins was brought for the purpose of canceling certain shares of the corporate stock, certain alleged fictitious indebtedness of the defendant company, and compelling a conveyance of certain land to said company, and therefore plaintiff's attorney's lien could never attach to any specific property; that whatever lien or interest plaintiff may at one time have had in the aforesaid causes of action, he caused to be conveyed to Preston B. Moss; that the court is without jurisdiction to render a personal judgment against Omar Hoskins or Maggie Hoskins, and therefore plaintiff is not entitled to recover in this action, and the defendant Montana Coal & Iron Company is entitled to a judgment for its costs."

Finding No. 7 is wholly immaterial. It is not responsive to [2] any issue involved in the case. Plaintiff does not seek to recover anything due him for services rendered after the settlement agreement was effected and the documents deposited with the bank. Neither is there a suggestion in the findings or evidence that plaintiff abandoned his employment. His work had been completed. The litigation had been settled, and nothing further remained to be done, except the payment of the balance of the settlement price according to the settlement agreement.

So much of finding 8 as relates to the failure of plaintiff to [3] give notice of his lien or claim is likewise immaterial. The attorney's lien sought to be established and foreclosed in this suit is altogether the creation of the statute. (Rev. Codes, sec. 6422.) The statute itself is notice to the world of the lien, and, in the absence of any provision requiring notice, the giving of notice is not necessary. (*Peri v. New York Cent. & H. R. R. Co.*, 152 N. Y. 521, 46 N. E. 849; *Whitwell v. Aurora*, 139 Mo. App. 597, 123 S. W. 1045.)

In finding 8 the court also declares that by his conduct plaintiff led Moss, Smith, the bank, and the Montana Coal & Iron Company to believe that he had no interest in the documents on deposit in escrow with the bank. The purpose of this finding is not clear. No conclusion of law is drawn from it; on the contrary, the court determined that plaintiff's lien never attached to any specific property because of the peculiar character of the actions prosecuted by him for Omar and Maggie Hoskins, and further held that plaintiff transferred to Moss any lien which he had upon the two causes of action. But it is unnecessary to consider this portion of the findings further; for there is not even a scintilla of evidence to support it.

If by the concluding clause of finding No. 9 the trial court intended to convey the idea that payment of the deferred installments of the settlement price might be made to the bank or to Hoskins at the discretion of Moss, such finding is directly contrary to the evidence. Under the terms of the settlement agree-

ment the deferred payments were to be "deposited in the said bank to the credit of said Omar Hoskins and Maggie Hoskins." The place of payment was determined definitely, and there was no room for the exercise of discretion.

Finding 10 is to the effect that in making payment of the [4] final installment in Portland, it was not the intention of Moss, Smith or the Montana Coal & Iron Company to defeat plaintiff's lien. That payment was made by Smith; but it is of no consequence what his intention was in making it in Portland instead of to the Billings bank, as the agreement required. The statute provides that the attorney's lien "cannot be affected by *any* settlement between the parties before or after judgment." The allegation in the complaint that payment of the final installment was made in Portland to deprive plaintiff of his lien is not material, since it could not have been effectual for that purpose, unless plaintiff had consented, which he did not.

By finding No. 11 the court must have intended to say that the 444 shares of stock owned by Omar Hoskins were never the subject of litigation in either action brought by plaintiff for Omar and Maggie Hoskins; for finding No. 2 is to the effect that certain other shares of the capital stock of the Montana Coal & Iron Company were involved in one of those actions.

Upon the question whether the payment of the final installment was made in Portland with or without the knowledge or [5] consent of plaintiff, the court made no finding; but this being a suit in equity, and the evidence all before us, we are authorized by section 6253, Revised Codes, to determine the fact, and this can be done without difficulty. The plaintiff testified that he knew nothing whatever of the contemplated payment in Portland, and that, if he had known of it, he would not have consented, and there is not any evidence to the contrary.

Eliminating from consideration the findings herein held to be immaterial or not supported by the evidence, and supplementing the remaining findings by the fact that the final pay-

ment was made in Portland, without the knowledge or consent of plaintiff, and every material allegation of plaintiff's complaint is found to be true.

We cannot assent to the doctrine that, independently of his client, an attorney cannot assert his lien prior to judgment or [6] settlement. The statute declares that the lien attaches in favor of counsel for plaintiff from the commencement of the action. The method by which such lien may be enforced is not material in this action. There was a settlement which had the effect of a judgment for all purposes of plaintiff's lien. The settlement involved the transfer of the 444 shares of stock and the assignments of the two causes of action by Omar and Maggie Hoskins to Moss, and the payment by Moss of the stipulated price. There was not any delivery of the certificate representing these shares nor of the assignments of the causes of action, whoever may have handed them to the bank. They were in escrow, held for the benefit of all the parties in interest, including the plaintiff, who, though not nominally a party to the agreement, was interested in it, and at least tacitly consented to its terms.

In our former opinion we held that the attorney's lien attached to the documents in escrow from the time the settlement [7] was effected until final payment was made according to the terms of the agreement, unless sooner released by satisfaction or otherwise, and this upon the theory that the fruit of the litigation was the settlement agreement—not the paper evidencing it; that, since by the terms of that agreement the certificate of stock and the assignments should be held in escrow until final payment was made according to the terms of the agreement, for the time being, and until such final payment was so made, those documents took the place of the money to be realized, and constituted the security for the faithful performance of the agreement. That decision became the law of this case. Of course, if plaintiff, with knowledge that the final payment was about to be made in Portland, had acquiesced, he

could not be heard to complain now, or, if he had delayed the assertion of his claim for an unreasonable time after he became aware that the agreement had been violated, he might well be guilty of laches; but until he knew of such violation he had a right to rely upon the agreement that the money would all be paid into the bank. It was not until he became aware that the provisions of the agreement had been violated that he was called upon to act. He was without knowledge that such violation was contemplated, and he acted promptly upon discovering that the agreement had not been carried out according to its terms.

While it is elementary that the client controls the course of [8] litigation, including the settlement of it, in the sense that the attorney cannot stand in the way of a settlement which his client desires to effectuate, nevertheless the settlement, when made, is subject to the claim of the attorney, and the parties making settlement are bound to take notice of such claim. Smith and Hoskins were chargeable with notice that plaintiff's lien could not be affected by the payment of the last installment to Hoskins directly, and in making that payment as he did, Smith simply acted at his peril, and neither he nor his assignee, who stands in his shoes, can complain that plaintiff is asserting the lien which the statute gives to him.

The statement in the court's conclusions that plaintiff transferred to Moss any lien which he may have had upon the causes of action, if intended as a finding of fact, is without any evidence to support it; if intended as a conclusion of law, there is not any finding or evidence to justify it.

The two actions have been dismissed, and, since plaintiff is not asking to have the orders of dismissal set aside, the assignments of those causes of action are no longer available as security for plaintiff's lien.

The judgment and order are reversed, and the cause is remanded to the district court, with directions to modify the findings as herein indicated, and to enter a decree in favor of the plaintiff establishing his lien upon the 444 shares of stock and

the certificate representing them, and directing foreclosure and sale according to the usual course of procedure in such cases.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

STATE EX REL. COHEN, RELATOR, v. DISTRICT COURT
ET AL., RESPONDENTS.

(No. 3,944.)

(Submitted November 11, 1916. Decided January 27, 1917.)

[162 Pac. 1053.]

Certiorari—Probate Courts—Jurisdiction—Executors and Administrators—Attorneys' Fees—Recovery Back.

Executors and Administrators—Employment of Counsel.

1. The employment of counsel by an administrator is a personal matter, and creates no relation between the attorney and the estate.

[As to power of administrators to make estates of decedents liable for attorneys' fees, see note in 93 Am. Dec. 393.]

Same—Attorneys' Fees—Recovery Back—Probate Courts—Jurisdiction.

2. Where an administrator expends funds of the estate in his charge for the employment of counsel, and the probate court refuses to make allowance therefor, he or his bond must make good; but the estate cannot demand of, nor can the court while sitting in probate order, the attorney to return such funds without a jury trial of the issues presented in a proper civil action, upon the necessity and value of the services.

Same.

3. Funds of an estate expended by the administrator for attorney's fees are not recoverable on the theory that the attorney—a stranger—has property of the estate in his possession for which he may be called to account under sections 7505 and 7506, Revised Codes; the jurisdiction of the court sitting in probate under these provisions extending no further than to require the accused to appear and submit to an examination, it having no power to adjudge rights which may be asserted or involved.

Proceeding by the State, on the relation of M. S. Cohen, against the District Court of the Fifth Judicial District in and for the County of Jefferson, and Honorable Joseph C. Smith, a Judge thereof, to review and annul an order of the court while sitting in probate. Order annulled.

Messrs. Nolan & Donovan, for Relator, submitted a brief; *Mr. L. P. Donovan* argued the cause orally.

Mr. J. H. Alword and *Mr. J. E. Kelly*, for Respondents, argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

Proceeding on the relation of M. S. Cohen to review and annul a certain order of the district court of Jefferson county sitting in probate. The record shows the following: James S. Flaherty, administrator of the estate of Edward Cardwell, deceased, filed his affidavit in the matter of said estate, reciting that John L. Cardwell, his predecessor in the administration, had without permission of the court paid to the relator a certain sum of money out of the funds of said estate, and that said funds are short in the amount so paid. Thereupon a citation was issued commanding the relator to appear and show cause why he should not be adjudged as in contempt for receiving said money, and why he should not be compelled to repay the same to the administrator Flaherty. The relator appeared, and by appropriate motion challenged the sufficiency of the affidavit to warrant any citation or to give jurisdiction to the court. This was overruled, and evidence was taken which tended to show that prior to the payment by Cardwell to the relator an order had been made by said court forbidding the disbursement of any funds of said estate by the administrator or by the depositary without express authority of the court; that Cardwell hired the relator and Mr. L. P. Donovan to conduct certain important litigation in which the estate was involved which required counsel to proceed to Billings, Columbus, Boulder and other places, and made the payment in question for account of the expenses thereof; and that Cardwell knew, but the relator did not know at that time, of the order forbidding disbursements without express authority. At the close of the hearing, the court, Honorable Joseph C. Smith presiding, made the order in question, commanding the relator

to repay said money within ten days, and directing that his failure so to do be reported by the clerk for further action.

Some things of record, not material to the present inquiry, furnish an explanation of the order. The altogether unsatisfactory report of the administrator Cardwell shows that, besides the payment to the relator, various sums have been disbursed for fees and expenses of the attorneys without apparent necessity; and the spectacle of a small estate expending a large proportion of its substance in this way offers the righteous judge strong temptation to act summarily. This course, however, often defeats the purpose in view, because it goes too far or, for other reasons, cannot, as a matter of law, be upheld.

It is so here. The court was under no obligation to allow the expenditures, but could rightfully hold, as it did hold, that the administrator Cardwell should answer for the same; but [1] engagements between an administrator and an attorney for services to be rendered the estate are wholly personal, stand entirely upon the individual responsibility of the contracting parties, create no relation between the attorney and the estate. (*State ex rel. Kelly v. District Court*, 25 Mont. 33, 63 Pac. 717; 1 Ross on Probate Law, p. 763 *et cit.*) In contemplation of the law, payments made pursuant to such engagements are of no concern to the estate or those interested in it, until the administrator asks that allowance be made to him for them. He pays always at his own peril, for he can be allowed only such expenses in the care, management and settlement of the estate as are necessary, including reasonable attorney's fees (Rev. Codes, sec. 7631), and his judgment may be rejected by the probate court on the score of amount as well as of necessity. If this happens, he or his bond must make good regardless of whether he in turn can or cannot recoup from the attorney. As the attorney [2] cannot demand of the estate or receive from it, as such, moneys for services rendered, so the estate cannot demand of him moneys received from the administrator on the latter's sole responsibility. Were it otherwise, the estate would not be more but less protected than it is, for any attempt on its part to re-

cover would mean issues, based upon the necessity and value of the services, triable not to the probate court, which is directly concerned in the conservation of the estate, but to a jury in a civil action. (See *Estate of Sullivan*, 36 Wash. 217, 78 Pac. 945.)

Nor can the order be upheld upon the theory that the relator, [3] a stranger to the estate, possesses or has disposed of property, to-wit, funds, belonging to the estate for which he may be called to account. In such a case the probate court may require the parties accused to appear and submit to an examination (Rev. Codes, secs. 7505, 7506), but it has no jurisdiction to adjudge the rights or claims of right which may be asserted or involved. This, also, can only be done by the district court sitting as such in an action brought for the purpose. (*In re Roberts' Estate*, 48 Mont. 40, 135 Pac. 909.)

It follows that the order in question must be and it is annulled.

Order annulled.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

STATE, RESPONDENT, v. COLLINS, APPELLANT.

(No. 3,722.)

(Submitted November 29, 1916. Decided January 30, 1917.)

[163 Pac. 102.]

Criminal Law — Larceny — Jury — Challenges — Information — Sufficiency — "Horse" — Variance — Former Conviction — Instructions.

Grand Larceny—Former Conviction—Jury—Peremptory Challenges.

1. Defendant, on trial for grand larceny aggravated by a prior conviction of the same offense, was, under subdivision 2 of section 9257, Revised Codes, entitled to eight—not six—peremptory challenges.

On sufficiency of description of property in an indictment or information for larceny, see note in L. R. A. 1915B, 81.

Same—Limiting Peremptory Challenges—Record—Insufficiency.

2. Where defendant's bill of exceptions recited that, though entitled to eight peremptory challenges, he was accorded only six, but did not show whether he exercised all or any of the challenges allowed him, or offered to exercise one or both of those claimed to have been denied, it was insufficient to show that the court erred in depriving him of his right in this behalf.

Same—"Horse"—Information—Sufficiency.

3. *Held*, that an information alleging that defendant stole a "horse" is a sufficient charge of grand larceny, though subdivision 4, section 8645, Revised Codes, in defining the crime specifies the different species of the animal as diversified by age, sex or artificial means, *i. e.*, mare, gelding, stallion, *etc.*

Same—Livestock—Brands—Evidence—Variance.

4. After a horse had been identified by color, weight, brand and other distinguishing marks, as described in the information, evidence that the animal bore another brand did not constitute a fatal variance.

[As to brands on animals as evidence of ownership, see note in *Ann. Cas.* 1913E, 133.]

Same—Former Conviction—Variance—Failure of Proof.

5. Where defendant was found guilty of simple larceny under a charge of grand larceny aggravated by prior conviction, the failure of the state to introduce proof of the prior conviction constituted neither a failure of proof nor a variance, since section 9172, Revised Codes, authorizes conviction of any crime included in that charged, and aggravated larceny includes simple larceny.

Same—Instructions.

6. Where the information charged grand larceny after previous conviction, but no evidence of the previous conviction had been introduced, it was proper to instruct the jury to disregard the allegation of prior conviction, and, if they found defendant guilty, to fix his punishment as for a simple larceny.

Appeal from District Court, Lewis and Clark County; J. Miller Smith, Judge.

HENRY COLLINS was convicted of grand larceny and appeals from the judgment of conviction and an order denying him a new trial. Affirmed.

Mr. E. D. Phelan and *Mr. Lester H. Noble*, for Appellant, submitted a brief and argued the cause orally.

"It is a reversible error for the court to deny a party the right of peremptory challenges in any case where it is a right either by the common law or by statute, or to deny the full number to which a party is entitled either in civil or criminal cases." (24 Cyc. 336; *Todd v. State*, 85 Ala. 339, 5 South. 278;

People v. O'Neil, 61 Cal. 435; *People v. Keating*, 61 Hun, 260, 16 N. Y. Supp. 748; *State v. Cadwell*, 46 N. C. 289; *Allen v. State*, 7 Cold. (Tenn.) 357; *Fowler v. State*, 8 Baxt. (Tenn.) 573; *Harrison v. United States*, 163 U. S. 140, 41 L. Ed. 104, 16 Sup. Ct. Rep. 961.) The fact that the verdict of the jury limited the punishment so as to correspond to the number of peremptory challenges actually allowed, where the number is determined by the nature of the punishment, did not cure the error. (24 Cyc. 367, note 31; citing, *Fowler v. State*, *supra*.)

The information alleges that the defendant did willfully, unlawfully and feloniously steal, take and drive away, "one bay horse." The word "horse" does not describe an animal, the taking of which is grand larceny, regardless of value. (Rev. Codes, sec. 8645, subd. 4.) That there is a distinction between the word "horse" and the words used in the above section describing an animal, the taking of which is larceny, regardless of value, has been determined in this state. (*State v. McDonald*, 10 Mont. 21, 24 Am. St. Rep. 25, 24 Pac. 628.) In *State v. Plunket*, 2 Ala. (Stew.) 11, it was held that a gelding was defectively described as a horse under a statute describing punishment for the larceny of any horse, mare or gelding, foal or filly, *etc.* In *Martinez v. Territory*, 5 Ariz. 55, 44 Pac. 1089, it was held that a steer could not be described as a cow, under a statute, relating to the taking of a cow, steer, bull, calf, *etc.* In *State v. Tootle*, 2 Harr. (Del.) 541, it was held (*dictum*) that a lamb could not be described as a sheep in an indictment, under a statute, making it a felony to steal any ram, ewe, sheep or lamb. In *Mobley v. State*, 57 Fla. 22, 17 Ann. Cas. 735, 49 South. 941, it was held that a three or four year old steer could not be described as a cow, where the statute drew a distinction between a cow and a steer by enumerating both. In *State v. Buckles*, 26 Kan. 237, it was held that a gelding could not be described as one "light bay horse," under a statute, which specifically named both geldings and horses.

In *State v. McDonald*, 10 Mont. 21, 24 Am. St. Rep. 25, 24 Pac. 628, it was held that a gelding could not be described as

a horse or colt, where the statute does not contain "horse." In *Turley v. State*, 3 Humph. (Tenn.) 323, it was held that a gelding could not be described as a horse where the statute enumerates both. In *Banks v. State*, 28 Tex. 644, it was held that a mare could not be described as a horse. In *Persons v. State*, 3 Tex. App. 240, it was held that a gelding could not be described as a certain horse under statutes specifically naming both horses and geldings. In *Briscoe v. State*, 4 Tex. App. 219, 30 Am. Rep. 162, it was held that "ridgeling" should be described as a horse and not as a gelding. In *Johnson v. State*, 16 Tex. App. 402, it was held that a horse could not be described as a gelding in an indictment under a statute in which the word "horse" was used as synonymous with the word "stallion." In *State v. Brookhouse*, 10 Wash. 87, 38 Pac. 862, it was held that steers could not be described by the term "cattle."

Where a statute specifically sets forth certain species of animals, and states that the stealing of those animals shall be grand larceny, without regard to their value, that statute is a special one, and should be strictly construed, and its application should be confined to the specific animals named.

"As a general rule, matter alleged in identification of property must be proved as alleged, although the description is unnecessarily specific." (22 Cyc. 446; *Morgan v. State*, 61 Ind. 447; *Gray v. State*, 11 Tex. App. 411.) This principle of law has been held to apply to the brand on cattle and horses. (*Coleman v. State*, 21 Tex. App. 520, 2 S. W. 859.)

Mr. J. B. Poindexter, Attorney General, and *Mr. C. S. Wagner*, Assistant Attorney General, for Respondent, submitted a brief; oral argument by *Mr. Wagner*.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The defendant was convicted of grand larceny and adjudged to serve a term in the state prison. He has appealed from the judgment and an order denying his motion for a new trial.

1. The subject of the larceny is described in the information as "one bay horse with a white stripe on forehead, weighing [1] about 1,000 pounds, and branded **E—** on the left shoulder." It is further charged that the defendant was previously convicted of the crime of grand larceny and served a term in the state prison therefor. The information was so framed to enable the jury or the court, upon conviction of the defendant as charged, to fix his punishment as prescribed in section 8897 of the Revised Codes. (*State v. Paisley*, 36 Mont. 237, 92 Pac. 566.) Since the punishment for grand larceny is imprisonment in the state prison for not less than one nor more than fourteen years, the charge here, if sustained as made, would have required the penalty to be fixed under subdivision 1 of that section, or at a term of not less than ten years. (*State v. Paisley, supra.*) Counsel contend that, since defendant was put upon his trial for the aggravated offense, he was entitled to eight peremptory challenges, under subdivision 2 of section 9257 of the Revised Codes, whereas he was permitted to exercise only six, and hence was denied a substantial right. An examination of the provisions referred to makes it clear that the defendant was entitled to eight challenges. The record, however, [2] does not advise us what transpired during the impaneling of the jury. It does not appear that the defendant exercised or offered to exercise the right of challenge to any particular juror, or that when the jury were sworn he had exhausted any of the challenges to which he was entitled. So far as we are informed, he was satisfied with the twelve jurors first called, and did not care to challenge any one of them. Upon this record we may not conclude that he was deprived of his right in this behalf. It is true the caption of the bill of exceptions recites that counsel "requested the right of eight peremptory challenges, which request was denied"; but this does not show that when the time came for counsel to exercise the right of challenge he was limited or circumscribed in any way. To put the trial court in error, it was incumbent upon counsel to have incorporated in the bill of exceptions the pro-

ceedings had, and by them to show that he offered to exercise one or both of the two additional challenges and was not permitted to do so. Otherwise we are left to conjecture as to what took place.

2. The contention is made that the information is defective in [3] that it fails to charge grand larceny. By subdivision 4 of section 8645 of the Revised Codes, the stealing of any of the animals therein enumerated is declared to be grand larceny without regard to value. It reads: "Grand larceny is larceny committed in either of the following cases: * * * 4. If any person or persons, shall steal or with intent to steal, shall take, carry, drive, lead or entice away any mare, gelding, stallion, colt, foal or filly, mule, jack or jenny, ox, cow, bull, stag, heifer, steer, calf, sheep, goat or hog, being the property of another, he or they shall be deemed guilty of grand larceny."

It will be observed that this provision omits the word "horse." Counsel argue that this omission indicates an intention on the part of the legislature to make a special provision on the subject of larceny of animals, and hence that an indictment or information under it must describe the particular animal with reference to which the charge is made, by the specific term by which it is therein designated. In other words, the term "horse," used in the information, does not describe any animal the taking of which is grand larceny without reference to value. This contention is, we think, devoid of merit. The term "horse" is generic, "including, ordinarily, the different species of the animal, however diversified by age, sex, or artificial means." (Anderson's Dictionary.) If the legislature had used only the term "horse," it could not be doubted that it would have been held to include all the varieties, whether natural or artificial, and proof of any one of them would have been deemed sufficient to support a charge designating it by the generic term, provided, of course, the description were otherwise sufficient to identify it. A horse is still a horse though it may be a stallion, or a gelding, or a mare.

In some of the states, as in Ohio, an indictment employing the generic term is held not to be supported by evidence of the larceny of a gelding. (*Hooker v. State*, 4 Ohio, 348.) This rule is observed in Texas, Kansas, Alabama, Tennessee, and perhaps other states. (*Banks v. State*, 28 Tex. 644; *State v. Plunket*, 2 Stew. (Ala.) 11; *State v. Buckles*, 26 Kan. 237; *Turley v. State*, 3 Humph. (Tenn.) 323.) The theory of these courts is that, inasmuch as the generic term is followed by the usual designations of the different sorts or classes, except the stallion, it must be presumed that the legislature intended by it to refer to a stallion only. In other states, where statutes are substantially the same as ours, it is held that the specifications "mare," "gelding," etc., were inserted to secure more definiteness. (*People v. Pico*, 62 Cal. 50.) This rule prevails in Utah and Missouri. (*People v. Butler*, 2 Utah, 504; *State v. Donnegan*, 34 Mo. 67.) In Illinois, under a statute which drew no distinction between animals and other personal property, the term "horse" was held to include a gelding or mare, and that proof of the larceny of either of the latter supported a charge of the larceny of a horse. (*Baldwin v. People*, 1 Scam. (Ill.) 304.) Our statute differs from those of the states referred to above in that they omit the term "stallion" and include the term "horse," whereas ours omits the latter and includes the former. We think the rule as declared by California, Utah and Missouri is sound in principle, and therefore adopt it as more in accord with modern notions of the administration of criminal law. (Bishop on Statutory Crimes, 3d ed., sec. 246.)

Counsel rely with confidence on the case of *State v. McDonald*, 10 Mont. 21, 24 Am. St. Rep. 25, 24 Pac. 628. We agree that, while there are observations in the opinion which justify this confidence, it must not be overlooked that the question presented and decided is not involved in this case except remotely and by analogy. The indictment in the case charged the larceny of an "iron gray horse, a gelding." After reaching the conclusion that the term "gelding" limited the meaning of the preceding generic term "horse," it was determined that the

charge was not supported by evidence of the larceny of a horse or colt, and hence that there was a substantial variance between the description in the charge and the evidence. If we assume that the first conclusion was correct—and this we do not now question—the second follows as a matter of course; for, if an indictment or information charges the larceny of a thing by a particular and specific description, it necessarily narrows the scope of the evidence and precludes conviction unless the thing is identified by the specific description alleged. This is all that was decided; the illustrative observations being merely *obiter dicta*.

3. The evidence fully identified the animal described in the [4] information, not only by proving clearly its color and weight, but also the brand and white stripe on the forehead. Incidentally it was made to appear that the animal bore another brand on a different part of its body. It is argued that proof of the additional brand presents a variance fatal to the state's case. The burden is upon the state to prove the description as alleged. When this has been done, the case thus made is not affected if the evidence discloses other descriptive marks.

The county attorney omitted to introduce any evidence [5] tending to show that the defendant had suffered a prior conviction for larceny. It is insisted that the omission in this behalf constituted a fatal variance. This argument proceeds upon the assumption that the aggravated larceny charged is wholly distinct from the offense of simple larceny, and since the county attorney proved the larceny, but failed to prove the prior conviction in aggravation, the conviction was improper. There was neither a variance nor a failure of proof. The statute declares that: "Upon the trial of an indictment or information, the defendant may be convicted of the crime charged therein, or of a lesser degree of the same crime, or of any crime included in the crime charged." (Rev. Codes, sec. 9172.) There can be no question that aggravated larceny includes simple larceny. Under the statute *supra* the conviction was proper.

4. The court instructed the jury to disregard the allegation [6] of the prior conviction, and, if they found the defendant guilty, to fix his punishment as for a simple larceny. This was correct. The instructions were in conformity with this theory of the case, and are not open to the criticisms made by counsel. The judgment and order are affirmed.

Affirmed.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

**McCLINTOCK, APPELLANT, v. CITY OF GREAT FALLS
ET AL., RESPONDENTS.**

(No. 3,968.)

(Submitted January 22, 1917. Denied February 1, 1917.)

[163 Pac. 99.]

*Cities and Towns—Indebtedness—Injunction—Water Plants—
Constitutional Limitations — Legislative Construction — Reve-
nues—Surplus Funds—Disposition.*

Cities and Towns—Indebtedness—Taxpayer's Suit—Injunction.

1. The interest a taxpayer has in a proposed city bond issue is sufficient to entitle him to bring suit to enjoin the expenditure of public funds if the city threatens to make unlawful use of them.

[As to taxpayers' actions, see note in *Ann. Cas.* 1913C, 892.]

Same—Expenditures—What Constitutes Cash Transaction.

2. Where a city has on hand funds available for a contemplated improvement in amount sufficient to discharge its obligations under contracts necessary to be entered into for that purpose as they mature, no indebtedness is contracted—it is a cash transaction.

Same—Procuring Water Supply—Additional Indebtedness.

3. A city had a water supply sufficient in quantity but unsuitable as to quality, and therefore issued bonds with the sanction of the

On effect of limitation of municipal indebtedness on acquisition of water supply system, see note in 59 L. R. A. 604.

On the question of right of taxpayer in absence of statute to enjoin unlawful expenditures by municipal corporation, see notes in 36 L. R. A. (n. s.) 1; L. R. A. 1916A, 908.

As to power of municipal corporation to engage in enterprise generally regarded as of a private character, see notes in 31 L. R. A. (n. s.) 117; 51 L. R. A. (n. s.) 1143; L. R. A. 1915B, 859.

electors, and sold the same for the purpose of procuring funds to install a filtration plant. The constitutional three per cent limit of indebtedness had theretofore been reached. *Held*, in a suit by a taxpayer for an injunction, that the contemplated expenditure was properly justifiable as one "to procure a water supply," within the meaning of section 6, Article XIII, of the Constitution, permitting indebtedness for such purpose in addition to the three per cent limit.

Same—Constitution—Nature of Instrument.

4. The state Constitution is not a grant of, but a limitation upon, powers which may be exercised, among others, by the legislative branch of the state government.

Same—Powers—Constitution.

5. A city is a creature of statute, and, in the absence of constitutional limitations, the legislature may prescribe for it such powers and privileges as it deems best.

Same—Procuring Water Supply—Additional Indebtedness—Constitution.

6. The only limitation placed by section 6, Article XIII, of the Constitution, upon the amount of indebtedness which a city may incur, in addition to the three per cent limit, for the purpose of procuring a water supply, is that it must have the approval of the taxpayers affected thereby.

Same—Water Supply—Indebtedness—Statutes.

7. Under section 3259, Revised Codes, the authority of a city to incur indebtedness beyond the constitutional three per cent limit for the purpose of rendering or maintaining its water supply wholesome and fit for human consumption is implied, if not expressly conferred.

Constitution—Legislative Construction—Effect.

8. Though courts are not bound by legislative construction of the Constitution; yet, if long acquiesced in, such construction is entitled to most respectful consideration.

Cities and Towns—Water Plants—Revenues—Surplus Funds—May be Disposed of, How.

9. Where, after making ample provision for retiring bonds issued to procure a water system, a city had accumulated a surplus over and above the amount necessary to discharge the interest on the indebtedness as it became due, it could properly expend such surplus in part payment of a necessary filtration plant, without the sanction of a taxpayers' vote, transfer it to its general fund, place it in a special fund, or devote it to any legitimate municipal purpose, without running counter to the provision of section 6, Article XIII, above, that the revenues obtained from the water system shall be devoted to the payment of the debt.

Appeal from District Court, Cascade County; J. B. Leslie, Judge.

ACTION by Joseph McClintock against the City of Great Falls and others. Judgment for defendants, and plaintiff appeals. **Affirmed.**

Mr. F. A. Ewald, for Appellant, submitted a brief and argued the cause orally.

Messrs. Cooper, Stephenson & Hoover, for Respondents, submitted a brief; *Mr. Ransom Cooper* and *Mr. W. H. Hoover* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In 1898 the city of Great Falls issued its bonds in the sum of \$376,000, and from the proceeds procured a water system for supplying the city and its inhabitants. In 1915 the city council, reciting that the city's only available means of water supply—the Missouri River—had become polluted to such extent that the water was no longer fit for use and was dangerous to health, that it was necessary to provide a filtration plant for purifying the water, and that such plant could be installed for \$150,000, submitted to the qualified electors the question whether the indebtedness of the municipality should be increased further beyond the constitutional limit of three per cent by an issue of bonds in the sum named to procure funds necessary for the purpose indicated. Pursuant to the authority conferred by a favorable vote, the city caused the bonds to be issued and sold and the proceeds deposited in the city treasury. It then entered into three contracts for the installation of a filtration plant at a cost exceeding \$187,000, and plaintiff, a taxpayer of the city, commenced this action to enjoin the payment of the contract price or the expenditure of any money in the further execution of the plan. The trial court after a hearing denied plaintiff any relief, and he appealed from the judgment entered in favor of the defendants.

1. There is not any merit in the contention that plaintiff has [1] not sufficient interest to authorize him to prosecute this action. The full faith and credit of the city are pledged to the redemption of the bonds issued (*Carlson v. City of Helena*, 39 Mont. 82, 17 Ann. Cas. 1233, 102 Pac. 39), and the interest

of the taxpayer is sufficient to give him standing in court if the city is threatening to make unlawful use of its public funds. (*Milligan v. Miles City*, 51 Mont. 374, L. R. A. 1916C, 395, 153 Pac. 276.)

2. Whether the city in entering upon the contracts for the [2] filtration plant incurred an indebtedness depends upon the state of its finances. If the city has on hand funds available for the purpose in amount sufficient to discharge its obligations under the contracts as they mature, then no indebtedness whatever was contracted. It is a cash transaction. (*Field v. Stroube*, 103 Ky. 114, 44 S. W. 363.)

3. Upon the trial it was made to appear that from the revenues derived from its water plant the city has paid the interest on its bonded indebtedness, the running expenses of the plant, including the cost of repairs, extensions, and betterments; has paid into its sinking fund for the redemption of its outstanding bonds \$113,000, and has accumulated a surplus of \$50,000. It appeared also that the revenues from the water plant will provide ample funds for interest, maintenance, and the discharge of its water bonds as they mature, including the present issue of \$150,000, and that it is the purpose of the city to expend for the filtration plant the surplus fund of \$50,000 in addition to the \$150,000 received from the sale of bonds.

Though the evidence is not very clear, we shall assume that [3] the city has reached the three per cent limit of indebtedness, and that the entire expense incident to the completion of the filtration plant ready for successful operation will not exceed \$200,000. It is the contention of appellant that the city has no funds whatever available to meet and discharge its obligations arising from the contracts; in other words, that the city cannot lawfully expend, for the purpose intended, either the \$150,000 derived from the sale of bonds or the \$50,000 surplus. Whether this contention should or should not be upheld depends upon the proper construction of the language of section 6, Article XIII, of the Constitution. That section declares that a city shall not incur any indebtedness for any purpose to an amount,

including outstanding indebtedness, in the aggregate exceeding three per cent of the value of the taxable property therein, except to construct a sewerage system or to procure a supply of water. Since the purpose to which the city desires to devote this money is not related in any manner to the construction of a sewerage system, the question presented is narrowed to the inquiry: May the expenditure of these funds be justified as one "to procure a supply of water?"

It is impressed upon our attention that the city has already a water supply sufficient in quantity to meet its requirements, and it is the contention of appellant that an expenditure for the purification of the water cannot be justified as one to procure a supply of water. Appellant's premise must be conceded, *viz.*, that, unless the installation of a filtration plant can be justified as within the meaning of the language of section 6 above, it cannot be justified in this instance at all. To arrive at the meaning of any provision of our Constitution, two considerations must be kept in mind: the character of the Constitution itself, and the particular subject matter under review. Speaking [4] generally, our Constitution is not a grant of powers, but a limitation upon the powers which may be exercised by the various branches of the state government. (*State ex rel. Hillis v. Sullivan*, 48 Mont. 320, 137 Pac. 392.) Except in so far as it is restricted by the Constitution, the legislature has all the law-making power possessed by any sovereign state. (*State v. Dodd*, 51 Mont. 100, 149 Pac. 481.)

A city of this state is a creature of statute. Independently [5] of legislation it cannot exist—cannot exercise any functions whatever. In the absence of constitutional limitations, the legislature would be free to prescribe for a city such powers and privileges as it deemed best. Since a city can act only by virtue of legislation, section 6, Article XIII, in its entirety is addressed to the legislature, and marks certain limits beyond which a municipality may not be authorized to go, in the matter of incurring public indebtedness. The subject matter of the section is municipal, township and school district indebtedness.

We are concerned with the subject to the extent only that it applies to municipalities—cities and towns. To what extent does the section seek to limit legislative authority over municipal indebtedness? It fixes by hard-and-fast rule three per cent of the value of the taxable property as the maximum indebtedness which a city may be authorized to incur for all purposes, except that additional indebtedness may be permitted under the sanction of a favorable vote by the taxpayers affected, when it is necessary to construct a sewerage system or to procure a [6] supply of water. There is no limit fixed to the amount of such additional indebtedness, and no restriction imposed upon the legislature with reference to it, except that it must have the approval of the taxpayers affected thereby.

The first legislation upon this subject after the adoption of the Constitution was enacted in 1893 (Laws 1893, p. 113). By that Act a city was authorized to incur an indebtedness in excess of the three per cent limit upon a favorable vote of the taxpayers to construct a sewerage system or to procure a supply of water. The same Act conferred upon the city which owned its water system jurisdiction over the stream or other source of supply. That Act was amended in 1897 (Laws 1897, p. 203), so as to confer upon such city jurisdiction over the stream or other source of supply for the purpose of enforcing sanitary regulations and preserving the purity of the water. As thus amended, the legislation was carried into the compilation of 1907 as section 3259, and is the law upon the subject to-day. [7] Under section 3259 the authority of a city to incur indebtedness beyond the three per cent limit for the purpose of rendering or maintaining its water supply wholesome and fit for the purpose intended is clearly implied, if not expressly conferred.

This court is not bound by a legislative construction of the [8] Constitution, but such a construction, long acquiesced in, is entitled to most respectful consideration (*Northern Pac. Ry. Co. v. Mjelde*, 48 Mont. 287, 137 Pac. 386); and in this instance the construction given to the language of section 6, Article XIII,

by the legislature coincides with our own view. Can it be said that a city which has a water supply sufficient in quantity cannot incur the additional indebtedness in order to render such supply suitable in quality? Assume that the water system acquired by the city of Great Falls in 1898 was adequate in quantity and quality, but that subsequently the water has become impaired in quality to such an extent that it is now unfit for human consumption, and that the maximum amount of revenue which the city may raise by general taxation is altogether insufficient to provide any practical means of purification; what, if any, avenue for relief is open to the city? It cannot meet the extraordinary expense from its ordinary revenues, for they are insufficient. It cannot incur an indebtedness for the purpose within the three per cent limit, for that limit has been reached already; and, according to appellant, it cannot incur an indebtedness for the purpose beyond the three per cent limit, for the Constitution forbids it. If appellant's theory be accepted, the city is helpless, for there are no other lawful means by which the necessary funds may be procured, and, since there is not any other available source of water supply for the city, the inhabitants have no other alternative but to abandon their homes and property and thereby destroy the security for the entire bonded indebtedness. We are unwilling to concede that the framers of our Constitution in drafting section 6, Article XIII, intended that their language should receive a construction which leads to such a result, unless that construction is commanded, and, if commanded, it evidences a short-sighted policy altogether out of harmony with the general purpose of the Constitution as a whole.

Considering the history of the times when the Constitution was written—the fact that cities of the territory were increasing in population more rapidly than in wealth, that they were even then confronted with the problem of securing funds necessary to supply their inhabitants with water, and that for all ordinary purposes the limit of indebtedness was set at three per cent of the value of the taxable property—and we think the conclusion

inevitable that by the use of the term "a supply of water" was meant a supply sufficient in quantity and suitable in quality to meet the demands of the city and its inhabitants. Under this construction any addition to the existing plant necessary to render it adequate for the purpose intended is fairly within the contemplation of section 6, Article XIII, above.

It is contended further that the injunction of the concluding [9] clause of section 6, Article XIII, renders unavailable the surplus fund of \$50,000. The section provides that the normal limit of indebtedness—three per cent—may be exceeded to enable a city "to procure a supply of water for such municipality which shall own and control said water supply and devote the revenues derived therefrom to the payment of the debt." The contention of counsel is that, since this surplus fund is a part of the revenues derived from the water system, it must be devoted to the payment of the \$376,000 debt, and can be used for no other purpose. Again, we think counsel places a too narrow construction upon the language of the constitutional provision. To illustrate: Let us assume that the city now has in its sinking fund a sum sufficient to discharge the entire indebtedness of \$376,000, the last installment of which does not fall due until 1933; must it continue to set apart the revenues derived from its water plant for that same purpose until the bonds all mature? Does the language quoted above mean that the city must devote *all* of the revenues derived from its water system to the payment of the debt, or does it mean that such revenues must be dedicated to the discharge of the bonded indebtedness so far as necessary for that purpose? To state the question is to answer it.

While this record does not disclose that the city actually has in its treasury funds sufficient to pay the entire indebtedness of \$376,000, it does convince us that ample provision has been made to retire those bonds as they mature, and that the expenditure of this \$50,000 for the installation of the filtration plant will not impair the city's credit nor lessen the bondholders' security. Under these circumstances any excess of revenues

derived from the water system over the amount necessary to discharge the interest on the indebtedness as it becomes due and meet the requirements of the sinking fund is not charged with a trust, but may be transferred to the general fund of the city or placed in a special fund and devoted to any legitimate municipal purpose. The expenditure of this fund of \$50,000 does not require the sanction of a taxpayers' vote.

It is alleged in the complaint that the taxpayers of Great Falls were induced to give their assent to the issue of bonds in the sum of \$150,000 by the representation of the city council that the entire filtration plant would not cost more than that sum; but the allegation was put in issue by the answer, and there was not any evidence introduced upon the subject.

The further contentions made by appellant do not call for special consideration. We find no error in the record.

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

STATE EX REL. BOARD OF RAILROAD COMMRS., RELATOR,
v. DISTRICT COURT ET AL., RESPONDENTS.

(No. 3,958.)

(Submitted December 5, 1916. Decided February 5, 1917.)

[163 Pac. 115.]

*Injunction Pendente Lite—Board of Railroad Commissioners
—Suspending Orders—Power of District Court.*

Injunction Pendente Lite—Orders of Railroad Commissioners—Power of District Court.

1. *Held*, that the district court has jurisdiction to use the provisional remedy of injunction *in limine* to suspend an order, made and promulgated by the board of railroad commissioners, requiring a railroad company to operate a local passenger train each way daily between designated stations, pending a final determination of an action brought by the company to have the order reviewed as unjust and unreasonable.

Same—Discretion.

2. An injunction does not issue as a matter of right in any case. The granting of it is discretionary; the discretion, however, is not arbitrary, but must be guided by conclusions based upon the law and facts of the particular case, and unless a case is presented certain as to both, the relief should be withheld.

[As to the right to grant temporary injunction before institution of action, see note in *Ann. Cas.* 1913E, 462.]

Certiorari by the State, on the relation of the Board of Railroad Commissioners, against the District Court of the First Judicial District in and for the County of Lewis and Clark, and R. Lee Word, a Judge thereof, to review an order of said court. Order affirmed.

Messrs. Veazey & Veazey, for Relator, submitted a brief; *Mr. I. Parker Veazey, Jr.*, argued the cause orally.

Mr. J. B. Poindexter, Attorney General, and *Mr. J. H. Alvord*, Assistant Attorney General, for the State, submitted a brief; *Mr. Alvord* argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Certiorari. On May 13, 1916, the state board of railroad commissioners, the relator herein, made an order designated as [1] "Order No. 160," requiring the Great Northern Railway Company (hereinafter referred to as the company) to operate a local passenger train each way daily between designated stations on its main line from Mondak, in Sheridan county, to Virden, in Toole county. It also directed the company to establish a like service between designated stations on its line extending southward from Great Falls, in Cascade county, to Billings, in Yellowstone county, giving the company the option, however, to furnish local Sunday service between Moccasin, in Fergus county, and Billings, by its through trains numbered 43 and 44. The purpose of the order was to require the company to extend the local service theretofore established, so as to include Sundays as well as week days. Thereupon, and on May 26, the company brought its action in the district court

of Cascade county to have the order reviewed as unjust and unreasonable so far as it required Sunday service between the points designated. The cause was thereafter transferred to the district court of Lewis and Clark county. Such proceedings were then had in that court that on July 10, after a hearing upon an order to show cause theretofore issued at the instance of the company, the court made and entered its order staying the order of the board and suspending its operation pending a review of it by the court and a final determination of the action. The board thereupon commenced this proceeding to have the order of the district court annulled as in excess of jurisdiction.

It is agreed by counsel on both sides that the order, though referred to in the petition as a stay order, is in effect an injunction. The question submitted therefore is: Has the district court in this class of cases jurisdiction to use the provisional remedy of injunction *in limine* to suspend an order or regulation made and promulgated by the board pending a final determination of the action in which a review of the order is sought? Counsel have devoted considerable space in their briefs to a discussion of the questions which they say were considered and decided by the district court upon the hearing on the order to show cause. Whether the conclusions of the district court in a solution of these questions were correct we are not required in this proceeding to decide.

The board was created by Chapter 37, Laws of 1907. (Laws 1907, p. 68.) The Act is incorporated in the Revised Codes as Chapter V, Title VIII, Part IV, Division I, sections 4363-4399, inclusive. For convenience, reference is made to the sections considered here by their Code numbers. The board is vested with very extensive powers and duties. Among numerous others it has power, and it is its duty, to establish and promulgate fair and just rates and charges for the transportation of passengers and freight by railroads operating in this state; to prevent extortion and unjust discrimination in this behalf, and to compel all such railroads to provide and maintain train service for both passengers and freight sufficient to furnish reason-

able accommodations to the public. Section 4384 confers upon the district court of the proper county jurisdiction to review any determination of the board "fixing any classification, rate, toll, charge, regulation or order," or its refusal to make, fix or establish such classification, rate, *etc.* The action must be commenced by the filing of a complaint in the proper county, and the defendant must be served with summons as in an ordinary action, or with an order of court fixing a reasonable time within which appearance may be made, not less than five days. The issues are made up by answer. If the court finds the order establishing the classification, rate, *etc.*, to be unjust and unreasonable, it becomes the duty of the board to revise it. Section 4390 authorizes any railroad deeming a classification, rate, toll, *etc.*, established by the board to be unjust and unreasonable, to bring the action against the board to have its determination reviewed. Section 4391 empowers any shipper to bring an action for the same purpose. To enforce any determination made by the board, section 4387 authorizes the court to entertain an action in the name of the state and by proper "decree, injunction or order" to compel obedience by the railroad to which the determination or order is applicable, if such road fails or refuses to yield obedience to it. This section recognizes the right in the defendant to question the justness or reasonableness of the order, and if the finding is against the defendant, it and its agent or officer responsible for the delinquency becomes subject to punishment as for a contempt. The agent or officer may also be imprisoned until he shall purge himself of the contempt. The decree remains in force until the board has changed or vacated its action. In all the proceedings had under these provisions the attorney general or the county attorney of the proper county is the attorney and counselor of the board, and must serve it as such in all actions which it is necessary for it to bring or defend. (Sec. 4383.)

It will be observed that the jurisdiction conferred upon the district court by sections 4383, 4384, 4387 and 4390, *supra*, is general, and that in the exercise of it the court is not in terms

limited or restricted, except in so far as a limitation and restriction may be imposed by some special provision to be found in some one of the sections. Section 4383 contains a general provision that all actions brought under the provisions of this law shall have precedence over all other business, except criminal business and special proceedings. This provision is repeated in section 4387. It has to do with procedure only. There is added to this section a provision which imposes upon the defendant railroad the burden of justifying its disobedience by clear and convincing evidence. Section 4390 contains two provisos, *viz.*: "That until the final decision in any such action the classification, rate, toll, charge, regulation or order of the board affecting rates or charges shall be deemed to be final and conclusive: And provided, further, that in any action, hearing or proceeding in any court, the classification, rate, tolls, charges, regulations and orders made, fixed and established by said board shall *prima facie* be deemed to be just, reasonable and proper." Provisos to the same effect are found in section 4391. They are not expressed in the most apt and appropriate terms; yet it is obvious, we think, that it was the purpose of the legislature in enacting the first to restrict the power of the court to disturb or suspend the operation of an order of the board promulgating a rate or charge until final judgment; while by the second it was the purpose merely to declare the rule by which the evidence must be weighed with reference to this kind of order as well as any other which the board may promulgate. The effect of the first is to take from the court all power of control over any order relating to rates and charges except by final judgment. This necessarily deprives a railroad company, as well as the shipper, of the right to invoke, and prohibits the court from issuing a preliminary injunction in this behalf. The rule of evidence declared by the second has nothing to do with remedies. This the legislature is presumed to have had in mind; for when it conferred on the court the power to review, it conferred it in general terms, making the single exception as to the availability of the provisional relief in the first proviso

supra, and leaving the court free to use its power when properly invoked as in ordinary cases. If no exception had been declared, there would have been no limitation. That the single one was declared strongly implies that the legislature did not intend to make any other. The declaration of the rule of evidence does not indicate a contrary intention. The most that can be said of this declaration is that it does not prescribe a rule different from that which applies in every other case in which [2] an injunction is sought. An injunction does not issue as a matter of right in any case. The burden is upon him who asks for it to establish by his proof his *prima facie* right to it. The granting or withholding it is discretionary, but the discretion is not arbitrary. It must be guided by conclusions based upon the law and facts disclosed by the particular case; and unless a case is presented certain as to both, the relief demanded will be withheld. (1 Spelling on Injunctions, sec. 20; *Bennett Bros. Co. v. Congdon*, 20 Mont. 208, 50 Pac. 556; *Campbell v. Flannery*, 29 Mont. 246, 74 Pac. 450.)

Though the determinations of the board are *prima facie* just and reasonable, this furnishes no compelling reason why the presumption in their favor may not be so satisfactorily overcome by evidence on the hearing of the application that the court would be constrained to grant relief just as it would in any other case. Inasmuch as the jurisdiction conferred is general, except so far as the legislature has expressly restricted it, we do not think that this court should impose any other restriction. It may be that the legislature should have imposed the same restriction as to all orders. This was for that body to determine, and not for the court. Doubtless it deemed it better to leave the whole matter to the exercise of a wise judicial discretion, anticipating that cases might arise in which the order complained of would be so clearly oppressive that immediate relief from it would be imperative. It may be assumed that, since the legislature has expressly declared that all the determinations of the board are to be deemed *prima facie* just and reasonable, the court should exercise its discretion with reserve

and caution. This consideration, however, is one affecting the mode of exercising the jurisdiction conferred, and is not pertinent to the inquiry whether the legislature intended to confer it.

The order of the district court is affirmed.

Affirmed.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

STATE EX REL. RESER, RELATOR, v. DISTRICT COURT
ET AL., RESPONDENTS.

(No. 3,972.)

(Submitted January 22, 1917. Decided February 5, 1917.)

[163 Pac. 1149.]

*Certiorari — Clerk of District Court — Powers — Judgment —
Entry and Rendition — Equity Cases — Mortgages — Fore-
closure.*

Clerk of District Court—Decree—Entry and Rendition—Powers.

1. While the clerk of the district court may enter, *i. e.*, record a decree, he had no power to sign and enter, thus virtually rendering, one in a suit to foreclose mortgages on real and personal property, adjudging, among other things, that plaintiff recover principal, interest and attorneys' fees, holding defendants personally liable therefor, *etc.*, where the trial judge had done no more than transmitted to him his findings of fact and conclusions of law, without any further directions in the matter.

Same—Entry of Judgment—Prerequisite.

2. The proper functions of the clerk of the district court touching the entry of judgment are purely ministerial, and must be based upon a judgment actually pronounced, though not necessarily written and signed, or one pronounced by law, as in cases of default, verdict, *etc.*

Same—Entry of Judgment—Discretion.

3. The instances in which the clerk of the district court may enter judgment without express direction or pronouncement by the court are confined to those where no discretion can be exercised as to the terms of the judgment.

Original application by the state on the relation of Evert Reser for writ of *certiorari* running to the District Court, in and for Blaine County, in the Twelfth Judicial District, and John

A. Matthews, Judge of the Fourteenth District, presiding. Proceeding dismissed as to Judge Matthews, and order complained of annulled.

Mr. R. E. O'Keefe, for Relator, submitted a brief and argued the cause orally.

Messrs. McKenzie & McKenzie, for Respondents, submitted a brief; *Mr. John McKenzie* argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

On July 8, 1916, the clerk of the district court of Blaine [1] county received and filed the findings of fact and conclusions of law as made and forwarded by Honorable John A. Matthews, Judge presiding, in a certain cause then pending in that court wherein the Security Trust & Savings Bank of Charles City, Iowa, was plaintiff, and Evert Reser, Katherine Reser and Bertha G. Reser were defendants, which cause had been theretofore submitted for decision. These findings show that the action was to foreclose certain mortgages, to-wit, one upon real estate, and one upon chattels, given to secure promissory notes aggregating \$2,630 principal, which notes were executed and delivered by the defendants Evert and Katherine Reser in payment or part payment of a certain traction engine and plow outfit constituting, with some sixteen head of horses, the chattel security referred to; and in the conclusions of law it is declared that the plaintiff is entitled to a decree of foreclosure of said mortgages, to judgment for the sum of said notes with interest and attorney's fees, and to a decree or order of sale of said property or so much thereof as may be necessary. Thereafter, and without any order or direction from the court or any further action by the judge thereof, but on motion of the attorneys for the plaintiff, the clerk signed, filed and entered what purports to be a final judgment in the cause, reciting that the court had carefully considered all the evidence presented; had examined the authorities cited, and had made its findings

and conclusions of law (which findings and conclusions are neither inserted nor otherwise referred to), and adjudging and decreeing that plaintiff recover from the defendants \$3,593.25, the amount of principal, interest, attorney's fee and costs; that both defendants, and each of them, are personally liable therefor; that the same is a valid lien upon the lands and personal property described in the mortgages; that said property, or so much thereof as may be sufficient, be sold; that plaintiff is entitled to and may purchase said property at such sale, and that the defendants, including Bertha Reser, and "all persons claiming from or under them, or either of them, and all persons claiming to have acquired any estate or interest in or to said premises subsequent to the filing of the notice of the pendency of this action, as set out in said findings (no reference is made in the findings to any such notice) be forever barred and foreclosed of and from all equity of redemption and claim in, of or to said premises, except the right to redeem as provided by law." Certain sales having been had and others being threatened under this purported judgment, the defendants brought this proceeding to review and annul the same upon the ground, among others, that the clerk had no power or authority to make or enter it.

We think the contention must be sustained. While it is undoubtedly the function of the clerk in every case to enter, *i. e.*, record, the judgment, we know of no instance where he is empowered to render one. Counsel for respondents seem to concede this, but argue that the findings of fact and conclusions of law were the judgment which the clerk did but enter and record under the plain mandate of section 6764, Revised Codes. This, however, is untenable, for the very language of that section makes it clear that the findings of fact and conclusions of law are not the judgment, but merely the foundation for the judgment; and this must be particularly noted in cases of this kind. Judgments, like the causes of action from which they spring, are either at law or in equity—the latter, for purposes of instant distinction, being commonly termed "decrees," and between

the two classes great and fundamental differences exist. A judgment at law is absolute, inflexible, expressive of the invariable rules of law applicable to the established facts in issue, taking no note of the situation of the parties or the means of enforcing the liability declared by it. A decree, on the other hand, is seldom predetermined as to its terms, by the general decision for or against the plaintiff or the defendant; it stands upon the particular merits of the controversy as they impress themselves upon the conscience of the chancellor, guided by principles broader than those of the law; it is the decision of the man who frames it as the interpreter of the moral standard which equity sets up; it is adjustable to all the exigencies of the litigation and to all the degrees of right or merit by which the parties may be distinguished, and it may, as often happens, contain specific directions for carrying out its purposes, provisions fixing the status of the parties, or prescriptions touching their course of conduct. (Freeman on Judgments, sec. 9; Black on Judgments, sec. 1; *Broder v. Conklin*, 98 Cal. 360, 364, 33 Pac. 211.) The application of these distinctions and their consequences are made manifest by the circumstances of this case. No such decree as the one before us was commanded by the findings in point of fact or followed from them as a necessary inference. Both real and personal property were involved, and, of the former, property to which a third person, not a party to the mortgages, laid claim; and specific directions as to how the sale should be conducted and how, for the purposes of such sale, the assets should be marshaled were quite in order. The decree contains no recognition of these things but does contain sundry provisions not foreshadowed in the findings, and which are therefore attempts on the part of the clerk to perform [2] judicial acts. The proper functions of the clerk touching the entry of judgment are purely ministerial, and their valid exercise requires a judgment which has been actually pronounced by the court—not necessarily written and signed, or else a judgment pronounced by the law as a necessary consequence of the facts established—as in cases of default, verdict,

[3] *etc.*; but the instances wherein the clerk may even enter judgment without express direction or pronouncement by the court are of necessity confined to those wherein no discretion can be exercised as to the terms of the judgment. That the judgment at bar is not of this character is clear from what it contains as well as from what it omits.

Some contention is made on behalf of the respondents that *certiorari* is not the proper remedy; but inasmuch as the purported judgment in question cannot be upheld on any theory, we have preferred to so declare rather than to engage in a disquisition touching the technical aspects of the procedure invoked. The very postulate of this proceeding, however, is that the respondent, Judge Matthews, had nothing to do with the making or entering of the so-called judgment; as to him, therefore, the proceeding must be dismissed, and it is so ordered.

The action of the clerk in making and entering the judgment referred to and said judgment with all proceedings had thereunder are annulled.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

Rehearing denied April 3, 1917.

IN RE PEPIN'S ESTATE. PEPIN, APPELLANT, v. MEYER
ET AL., RESPONDENTS.

(No. 3,912.)

(Submitted January 24, 1917. Decided February 9, 1917.)

[163 Pac. 104.]

*Probate Proceedings—Wills—Revocation—Parties—Parent and
Child—Adoption—Decree—Collateral Attack—Fraud—Coer-
cion.*

Wills—Probate—Revocation—Parties.

1. Only those who, but for the will, would succeed in some degree to decedent's estate are persons who may seek revocation of probate thereof.

Same—Heirship—Adoption—Rights of Adopted Child.

2. As against collateral heirs, an adopted child, in the absence of a will, succeeds to all the estate of the person adopting.

[As to right of adopted children to inherit, see note in 118 Am. St. Rep. 684.]

Adoption—Decree—Collateral Attack.

3. The rule that a judgment valid on its face is not subject to collateral attack based upon considerations *dehors* the record is especially applicable to a decree of adoption.

Same—Adoption—Collateral Attack.

4. An attack upon a decree of adoption rendered some twelve years before, using as a means therefor a proceeding to contest a will and procure its revocation, is collateral and outside the jurisdiction of probate courts.

Same—Who may Adopt—Persons of Different Races.

5. The fact that the person adopting and the one adopted were of different races did not constitute an obstacle to adoption under section 310, Civil Code of 1895.

Judgments—Who may Attack.

6. To avoid a judgment for fraud, the person attacking it must show that he has rights which were vested at the time it was rendered and were injuriously affected by it; for rights accruing after its rendition, attack on it may not be made.

Adoption—Fraud—Coercion—Who may not Attack Decree.

7. One who had no right in the estate of a decedent other than as collateral heir, was not in a position to attack a decree of adoption twelve years after its rendition, for fraud or coercion said to have been practiced upon decedent by the parents of the child adopted.

On right of parties to adoption proceedings or their privies to attack decree of adoption, see note in 30 L. R. A. (n. s.) 159.

Authorities passing on the question of right of adopted child to inherit, see comprehensive note in 30 L. R. A. (n. s.), particularly at page 917.

Appeal from the District Court, Hill County; John W. Tattan, Judge.

IN THE MATTER of the estate of Simon Pepin, deceased. Petition of Exor A. Pepin against Elizabeth Meyer and others for revocation of probate of will was dismissed, and he appeals. Affirmed.

Mr. Wellington D. Rankin, for Appellant, submitted a brief and argued the cause orally.

The petition states facts sufficient to constitute a cause of action and shows that petitioner is a party interested. In order that petitioner may be interested, it is, of course, sufficient if he shows that in the absence of a valid will he would be entitled to share in the estate. This he has done by showing that there was no valid adoption of Elizabeth Trottier by the deceased. The petition sets forth that the adoption proceedings are void and of no effect, because the consent of Simon Pepin to institute the proceedings to adopt the child was procured by means of fraud, undue influence, threats, duress, compulsion and force, and that the said proceedings were void because there was fraud practiced upon the court by means of which the decree of adoption was procured. Such facts have frequently been held to be sufficient grounds for setting aside a decree of adoption. (1 C. J. 1392; 1 Am. & Eng. Ency. of Law, 736; *Tucker v. Fisk*, 154 Mass. 574, 28 N. E. 1051; *Booth v. Van Allen*, 7 Phila. (Pa.) 401; *Lee v. Back*, 30 Ind. 148; *Beatty v. Davenport*, 45 Wash. 555, 122 Am. St. Rep. 937, 13 Ann. Cas. 585, 88 Pac. 1109; *Furgeson v. Jones*, 17 Or. 204, 11 Am. St. Rep. 808, 818, 3 L. R. A. 620, 20 Pac. 842; *Taber v. Douglass*, 101 Me. 363, 64 Atl. 653; *Miller v. Higgins*, 14 Cal. App. 156, 111 Pac. 403.)

A contingent interest is sufficient to give one the right to contest a will. The petitioner has at least a contingent interest, which under the laws of Montana would be sufficient to permit

him to contest a will. (*State ex rel. Donovan v. Second Judicial District Court*, 25 Mont. 355, 65 Pac. 120.)

This proceeding is a direct attack upon the adoption proceedings. Though the prayer does not ask that the decree of adoption be set aside, the petition warrants such relief and therefore the proceeding is a direct and not a collateral attack on the adoption proceeding. The term "collateral attack" has been defined by this court in *Burke v. Interstate S. & L. Assn.*, 25 Mont. 315, 87 Am. St. Rep. 416, 64 Pac. 879, as follows: "By 'collateral attack,' as the expression is used in this opinion, is meant every proceeding in which the integrity of a judgment is challenged, except those made in the action wherein the judgment is rendered or by appeal, and except suits brought to obtain decrees declaring judgments to be void *ab initio*." The proceeding clearly comes within the last exception above stated, and is therefore not a collateral attack. (*Thompson v. McCorkle*, 136 Ind. 484, 43 Am. St. Rep. 334, 34 N. E. 813, 36 N. E. 211; *Schneider v. Sellers*, 25 Tex. Civ. 226, 61 S. W. 541.)

The court erred in dismissing petitioner's action without giving petitioner an opportunity to amend, if the petition did not state a cause of action. (*In re Sullivan's Estate*, 40 Wash. 202, 111 Am. St. Rep. 895, 82 Pac. 297; *Hoffman v. Steffey*, 10 Kan. App. 574, 61 Pac. 822; *Raleigh v. First Judicial District Court*, 24 Mont. 306, 315, 81 Am. St. Rep. 431, 61 Pac. 991; *State v. Clancy*, 30 Mont. 529, 540, 77 Pac. 312; *In re Rick's Estate*, 160 Cal. 467, 117 Pac. 539.)

Messrs. Norris & Hurd, for Respondents Meyer and Trottier, and *Messrs. L. V. Beaulieu* and *A. F. Lamey*, for Respondent Broadwater, submitted a brief; *Mr. Geo. E. Hurd* and *Mr. Beaulieu* argued the cause orally.

Who is a person interested? Under the statutes generally, an action to contest a will can be brought only by a "person interested" at the time the will was admitted to probate. Such "persons interested" include not only those named as bene-

ficiaries, but also those who would share in the estate in case of intestacy, such as the heirs, or next of kin, and those interested under a prior will. A remote, contingent interest, which under certain conditions which may never exist might become an actual and vested interest, is not sufficient. (40 Cyc. 1243; *McDonald v. White*, 130 Ill. 493, 22 N. E. 599; *Storrs v. St. Luke's Hospital*, 180 Ill. 368, 72 Am. St. Rep. 211, 54 N. E. 185.) A direct pecuniary interest at the time of the probate of the will is a condition precedent to the right to contest. (*Teckenbrock v. McLaughlin*, 246 Mo. 711, 152 S. W. 38; *Halde v. Schultz*, 17 S. D. 465, 97 N. W. 369.) One who would take nothing under the statute of distribution, if there was no will, cannot contest it. (*State v. Lancaster*, 119 Tenn. 638, 14 Ann. Cas. 953, 14 L. R. A. (n. s.) 991; *Gore v. Howard*, 94 Tenn. 577, 30 S. W. 730; *Cassem v. Prindle*, 258 Ill. 11, 101 N. E. 241; *Ingersoll v. Gourley*, 72 Wash. 462, 130 Pac. 743; *In re Baker's Estate*, 170 Cal. 578, 150 Pac. 989; *Ligon v. Hawkes*, 110 Tenn. 514, 75 S. W. 1072; *Crawfordsville Trust Co. v. Ramsey*, 178 Ind. 258, 98 N. E. 177; *In re Fallon's Will*, 107 Iowa, 120, 77 N. W. 575; *In re Zollikofer's Estate*, 167 Cal. 196, 138 Pac. 995; *Montgomery v. Foster*, 91 Ala. 613, 8 South. 349; *Floore v. Green*, 26 Ky. Law Rep. 1073, 83 S. W. 133; *Wells v. Betts*, 45 App. Div. 115, 61 N. Y. Supp. 231; *State v. McQuillin*, 246 Mo. 674, Ann. Cas. 1914B, 526, 152 S. W. 341.)

That an adopted child is "issue," within the meaning of section 4820, Revised Codes, is clear. (*In re Newman's Estate*, 75 Cal. 213, 7 Am. St. Rep. 146, 16 Pac. 887; *Riley v. Day*, 88 Kan. 503, 44 L. R. A. (n. s.) 296, 129 Pac. 524; *Virgin v. Marwick*, 97 Me. 578, 55 Atl. 520; *Ross v. Ross*, 129 Mass. 243, 37 Am. Rep. 321; *Power v. Hafley*, 85 Ky. 671, 4 S. W. 683; *Flannigan v. Howard*, 200 Ill. 396, 93 Am. St. Rep. 201, 59 L. R. A. 664, 65 N. E. 782; *Hilpire v. Claude*, 109 Iowa, 159, 77 Am. St. Rep. 524, 46 L. R. A. 171, 80 N. W. 332; 1 Cyc. 931.) In the case of *In re Williams' Estate*, 102 Cal. 70, 41 Am. St. Rep. 163, 36 Pac. 407, it was held that after the adoption of a minor, who by the laws of the state is entitled to succeed to the estate

of its adoptive parent, the parent's other relatives, nieces and nephews, have no capacity to contest his will or to oppose any disposition of his estate to which the adopted child does not object.

If the action or proceeding has an independent purpose, and contemplates some other relief or result, although the overturning of the judgment may be important or even necessary to its success, then the attack upon the judgment is collateral. (*Jenkins v. Carroll*, 42 Mont. 302, 112 Pac. 1064; *In re Evans*, 42 Utah, 282, 130 Pac. 217; *Duff v. Hagins*, 146 Ky. 792, 143 S. W. 378; 23 Cyc. 1063.)

The petitioner is not an injured party. He had no rights whatever that were or could have been prejudiced by the adoption at the time the order of adoption was made. The only possible interest he could have had was as one of the heirs of Simon Pepin. But, as heretofore shown, no one has a vested right to be the future heir of a living person. (*In re Colbert's Estate*, 44 Mont. 259, 119 Pac. 791; *Gregley v. Jackson*, 38 Ark. 487; *Sleight v. Reed*, 18 Barb. (N. Y.) 159; *Hamilton v. Flinn*, 21 Tex. 713; *Caruthers v. Tarvin*, 8 Ohio Dec. 344; *Safe Deposit & T. Co. v. Gittings*, 103 Md. 485, 63 Atl. 1046; *Cropper v. Glidewell*, 52 Ind. App. 52, 98 N. E. 1012; *In re McWhirter's Estate*, 235 Ill. 607, 85 N. E. 918; *National Safe Deposit Co. v. Stead*, 250 Ill. 584, Ann. Cas. 1912B, 430, 95 N. E. 973; 14 Cyc. 25.)

The judgment of adoption is conclusive. (1 C. J. 1394; *Coleman v. Coleman*, 81 Ark. 7, 98 S. W. 733; *In re McKeag's Estate*, 141 Cal. 403, 99 Am. St. Rep. 80, 74 Pac. 1039; *Adams v. Adams*, 102 Miss. 259, Ann. Cas. 1914D, 235, 59 South. 84; *Richards v. Matteson*, 8 S. D. 77, 65 N. W. 428; *Crocker v. Balch*, 104 Tenn. 6, 55 S. W. 307; *Omaha Water Co. v. Schamel*, 147 Fed. 502, 78 C. C. A. 68; *Barnard v. Barnard*, 119 Ill. 92, 8 N. E. 320; *Jossey v. Brown*, 119 Ga. 758, 47 S. E. 350.)

MR. JUSTICE SANNER delivered the opinion of the court.

On the twenty-eighth day of December, 1914, an order was made by the district court of Hill county admitting a certain

instrument to probate as the last will and testament of Simon Pepin, deceased. Thereafter Exor A. Pepin filed his petition seeking to contest said will and to have the probate thereof revoked, upon the grounds that he and other persons named in his petition are collateral heirs of said Simon Pepin entitled to succeed to his estate in the absence of direct heirs or a valid will; that said will was not properly executed by Simon Pepin or published and declared by him to be such, in the manner required by law; that, if executed by him at all, it was the result of the menace, duress, fraud and undue influence of Rose Trottier and Elizabeth Meyer; and that at the time of its pretended execution Simon Pepin was not of sound and disposing mind and memory. On the face of the petition it is further made to appear that on July 27, 1902, Simon Pepin signed and on August 6, 1902, filed in the district court of Choteau county his verified petition reciting his desire to adopt as his own one Elizabeth Trottier "who is now of the age of eight years, and the daughter of Rose Trottier and Andrew Trottier, * * * husband and wife, * * * who have * * * given their full consent," which petition contains all the other matters and things then required by law in such cases; that thereafter and on October 1, 1902, there was filed and presented to the court an agreement in writing, executed in the presence of Charles H. Boyle, clerk of said court, between "Andrew Trottier and Rose Trottier, his wife * * * and Simon Pepin," whereby the Trottiers assented to the adoption of Elizabeth by Pepin, and he agreed that she should be adopted, treated and cared for in all respects as his own child and daughter, her name to be changed from Elizabeth Trottier to Elizabeth Pepin; that thereafter and on the same day a minute entry was made of such adoption and a final order or decree was signed by Honorable John W. Tattan, Judge of said court, which, after reciting the matters and things necessary to give jurisdiction, "ordered, adjudged, declared and decreed that the said child, Elizabeth Trottier, shall henceforth be regarded and treated in all respects as the child and daughter of the said petitioner, Simon Pepin, and that her name be, and

it is hereby, changed to Elizabeth Pepin''; that thenceforth and until his death in November, 1914, she was regarded and maintained by said Simon Pepin as his legally adopted daughter, and that she, known since her marriage as Elizabeth Meyer, is the principal devisee under the will of said Simon Pepin. Upon citation, the executors of said will as well as Elizabeth Meyer and Rose Trottier, devisees named therein, appeared and by elaborate motions to dismiss, challenged the sufficiency of the petition upon several grounds, the chief of which is that the petitioner has no such interest in the matter as to authorize the proceeding by him or at his instance. This motion was granted, and from the order dismissing the proceedings the petitioner appeals.

It is an elementary proposition that the only persons [1] authorized to contest or seek revocation of the probate of a will are those who, but for the will, would succeed in some degree to the decedent's estate. (Rev. Codes, sec. 7407; *State ex rel. Donovan v. Second Judicial District Court*, 25 Mont. 355, 65 Pac. 120; *Ingersoll v. Gourley*, 72 Wash. 462, 130 Pac. 743; *Wickersham's Estate*, 153 Cal. 603, 96 Pac. 311; *In re Zollikofer's Estate*, 167 Cal. 196, 138 Pac. 995.) It is also obvious [2] that if Elizabeth Meyer is the adopted daughter of Simon Pepin, she, under the statute, in the absence of a will would succeed to all his estate as against the petitioner or any other collateral heirs (Rev. Codes, secs. 3768, 4820; *In re Newman's Estate*, 75 Cal. 213, 218, 7 Am. St. Rep. 146, 16 Pac. 887); and it necessarily follows that the petition was properly dismissed for want of interest in the petitioner, unless the apparent fact of Elizabeth's adoption is in some manner overcome.

Appreciating this, the petitioner seeks to avoid *prima facie* the decree of adoption by allegations to the effect that the proceedings were without jurisdiction in the court; that Simon Pepin, being of French-Canadian blood, could not lawfully adopt Elizabeth Trottier, who is of Indian blood; and that the decree of adoption was procured by fraud on the court, in that the court was led to believe, and did believe, "that said child

was the child of Andrew and Rose Trottier," and "that it was decreeing an adoption desired and consented to by Simon Pepin, whereas his consent, if given at all, was procured by the fraud, menace, threats and duress of Rose Trottier in persuading said Simon Pepin to believe that Elizabeth was his daughter." We think the attack must fail for these reasons:

1. A comparison of the statutory provisions in force in October, 1902 (Civ. Code 1895, secs. 310-320 [Rev. Codes, secs. 3761-3771]), with the proceedings had in the matter of said adoption, is sufficient to establish that the latter were in apparent conformity to such provisions; the decree is therefore valid [3] on its face. A judgment or decree valid on its face is not subject to collateral attack based upon consideration *dehors* the record. (*Edgerton v. Edgerton*, 12 Mont. 122, 33 Am. St. Rep. 557, 16 L. R. A. 94, 29 Pac. 966; *Burke v. Interstate S. & L. Assn.*, 25 Mont. 315, 87 Am. St. Rep. 416, 64 Pac. 879; *Haupt v. Simington*, 27 Mont. 480, 94 Am. St. Rep. 839, 71 Pac. 672.) This is especially true of a decree of adoption by which the status of particular persons is fixed. (Rev. Codes, sec. 7914; 1 C. J. 1394, sec. 114; *Brown v. Brown*, 101 Ind. 340, 342.)

2. The purpose of this proceeding is to contest the will of [4] Simon Pepin and procure revocation of the probate thereof, and as a means to that end the petitioner attacks the adoption of Elizabeth Trottier; such an attack is not direct, but collateral. (*Jenkins v. Carroll*, 42 Mont. 302, 310, 311, 112 Pac. 1064; 23 Cyc. 1065; Van Fleet on Collateral Attack, secs. 2-6.) The significance of this is emphasized by the fact that the present proceeding is in probate (*In re Davis' Estate*, 27 Mont. 490, 495, 71 Pac. 757), and a court of probate is a court of limited jurisdiction. (*Bullerdick v. Hermsmeyer*, 32 Mont. 541, 81 Pac. 334; *State ex rel. Ruef v. District Court*, 34 Mont. 96, 115 Am. St. Rep. 510, 9 Ann. Cas. 418, 6 L. R. A. (n. s.) 617, 85 Pac. 866.) It cannot entertain even a direct attack upon any final order, decree or judgment not entered by itself; this can only be done by the district court sitting with plenary powers in the exercise of its civil jurisdiction. If this be so, it would

be singular reasoning which could authorize the court below to annul in this proceeding the order of adoption here sought to be questioned. (See *In re Trimm*, 30 Misc. Rep. 493, 63 N. Y. Supp. 952; *Ward's Estate*, 59 Misc. Rep. 328, 112 N. Y. Supp. 282.)

3. The fact—if it be a fact sufficiently alleged—that Simon [5] Pepin and Elizabeth Trottier were of different races constituted no obstacle to adoption under the law as it then existed. (Civ. Code 1895, sec. 310.)

4. The ground of attack is fraud upon the court, based upon matters *dehors* the record which are a trifle hard to appreciate. [6, 7] The order of adoption was entered in consideration of the fact that Simon Pepin on his part, and the Trottiers on theirs, had signified in lawful manner that Elizabeth should be adopted by Pepin, and that such action would be for the best interests of the child. The truth of these facts is not questioned, but the point is made that the court was led to believe Elizabeth was the child of Andrew and Rose Trottier, and that Pepin's consent to adopt her was only apparent because procured by deceit and duress exercised, not by the person adopted, but by her putative parents. Undoubtedly the court was led to believe Elizabeth was the child of Andrew and Rose Trottier—by the allegations of Pepin's own petition as well as by the fact that Elizabeth was born of Rose Trottier while Rose was the wife of Andrew Trottier, living with him as such; and that the court was not deceived in this respect is established by the provisions of Revised Codes, section 7961, subdivision 5, as well as by the petitioner's repeated allegations of deceit practiced upon Simon Pepin whereby Simon Pepin was persuaded to think that Elizabeth was his daughter. So far as the court was concerned, Pepin's petition and his agreement constitute a twice repeated consent to the adoption, he being perfectly competent; with the motives or reasons which impelled him the court had nothing to do further than to be satisfied of his disposition and capacity to adopt the child and treat her as his own; he alone was in position to attack the proceedings for fraud, for he alone, if

anyone, was injured by it. The rule is elementary that to avoid a judgment or other transaction for fraud, the person attempting to do so must show that he has rights which were vested at the time and were injuriously affected by it. (23 Cyc. 1068.) How was Exor Pepin injured? He was not in 1902 an heir of the living Simon Pepin, nor had he any natural or accrued right to be an heir of Simon Pepin at the latter's death (*In re Colbert's Estate*, 44 Mont. 259, 119 Pac. 791; 14 Cyc. 25); he was deprived of nothing by the adoption save a remote possibility. To say that with Elizabeth out of the way he would be entitled to succeed upon the death of Simon Pepin more than twelve years after the adoption is not enough; one whose rights accrue after a judgment is rendered cannot attack the judgment. (*Hogg v. Link*, 90 Ind. 346; *Johns v. Pattee*, 55 Iowa, 665, 8 N. W. 663; *Brace v. Reid*, 3 G. Greene (Iowa), 422; *Smith v. Elliott*, 56 Fla. 849, 47 South. 387.)

5. Finally, the facts alleged as invalidating Simon Pepin's consent are indecisive. They are that because of illicit relations between him and Rose Trottier, the latter was enabled to induce him to believe that Elizabeth was his natural daughter, and that her influence over him in that behalf was enforced by menaces on her part and on the part of her husband. That Pepin was ever deceived in respect of Elizabeth's relationship to him is refuted by his own petition for adoption—pleaded by the petitioner here—which recites that Elizabeth is the daughter of Rose and Andrew Trottier, husband and wife. Assuming it to be true that there were menaces, even that Pepin was bullied, coerced and driven into the adoption, he may nevertheless have become wholly satisfied with the arrangement, may have acquired through twelve years of association with Elizabeth in the adopted relation of parent and child, such affection as not to desire a change, may have, in effect, ratified what he could have had annulled, so that for Exor Pepin or anyone else there could be no ground of complaint. One has only to imagine the petitioner in this case seeking annulment of this adoption during the life-

time of Simon Pepin, to realize the futility of his present position.

In our opinion the petitioner has not and shows that he cannot allege any sufficient interest in the matter of Simon Pepin's estate to maintain this proceeding; the court was correct in dismissing his petition, and the order appealed from is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

IN RE PEPIN'S ESTATE. PEPIN, APPELLANT, v. MEYER
ET AL., RESPONDENTS.

(No. 3,911.)

(Submitted January 24, 1917. Decided February 9, 1917.)

[160 Pac. 107.]

(For syllabus, see *In re Pepin's Estate*, ante, p. 240.)

'Appeal from District Court, Hill County; John W. Tattan, Judge.

IN THE MATTER of the estate of Simon Pepin, deceased. Petition of Adolph A. Pepin against Elizabeth Meyer and others for revocation of probate of will was dismissed, and he appeals. Affirmed.

Mr. Wellington D. Rankin, for Appellant.

Messrs. Norris & Hurd, Mr. L. V. Beaulieu and Mr. A. L. Lamey, for Respondents.

MR. JUSTICE SANNER delivered the opinion of the court.

This appeal is from an order precisely similar in character, based upon the same kind of record and presenting identical

questions as that disposed of in *In re Pepin's Estate* (*Exor Pepin v. Elizabeth Meyer*), *ante*, p. 240, 163 Pac. 104, just decided. Upon the authority of that decision the order here appealed from is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

REYNOLDS, APPELLANT, v. JONES ET AL., RESPONDENTS.

(No. 3,728.)

(Submitted January 25, 1917. Decided February 16, 1917.)

[163 Pac. 469.]

*Appeal and Error—New Trial Order—Insufficiency of Evidence
—Discretion.*

Appeal and Error—New Trial Order—Affirmance, When.

1. An order sustaining a motion for new trial general in terms will be approved if it can be justified upon any one of the several grounds upon which it is made.

Same—New Trial—Insufficiency of Evidence—Discretion.

2. Where abuse of discretion on the part of the district court in granting a new trial on the ground, among others, of insufficiency of the evidence to justify the verdict, is not shown, it will stand affirmed.

[As to whether order for new trial improperly made on one ground will be sustained on appeal, where it appears that movant was entitled to new trial on another ground, see note in *Ann. Cas.* 1913B, 495.]

Appeal from District Court, Yellowstone County; Geo. W. Pierson, Judge.

ACTION by Margaret E. Reynolds against Frank N. Jones and wife. From an order granting a new trial, plaintiff appeals. Affirmed.

Cause submitted on briefs of counsel.

Mr. C. R. Ingle, for Appellant.

Messrs. Nichols & Wilson, for Respondents.

Negligence must be shown; it will not be presumed. (*Reino v. Montana Min. Land Dev. Co.*, 38 Mont. 291, 99 Pac. 853.) And plaintiff, suing for a personal injury negligently inflicted, has the burden of proving defendants' negligence. (*Byrnes v. Butte Brewing Co.*, 44 Mont. 328, Ann. Cas. 1913B, 440, 119 Pac. 788.) As a general proposition, a party who charges negligence as a ground of action must prove it. He must show that the defendant by his act or by his omission has violated some duty incumbent upon him, and thereby caused the injury complained of. (*Mitchell v. Chicago etc. Ry.*, 51 Mich. 236, 47 Am. Rep. 566, 16 N. W. 388; *Atkinson v. Goodrich Transp. Co.*, 69 Wis. 5, 31 N. W. 164; *Hayes v. Michigan Cent. R. Co.*, 111 U. S. 228, 28 L. Ed. 410, 4 Sup. Ct. Rep. 369.) If the injury arises from a casualty purely accidental, the party is necessarily left to bear it. It is not enough to show merely that an accident happened, and that injury resulted therefrom. And when an event takes place, the real cause of which cannot be traced, or is at least not apparent, it ordinarily belongs to that class of occurrences which are designated as purely accidental, and the party who asserts negligence must show enough to exclude the case from the class so designated. (*Lewis v. Flint & P. M. Ry.*, 54 Mich. 55, 52 Am. Rep. 790, 19 N. W. 744; *Bennett v. Ford*, 47 Ind. 264; *Wabash etc. Ry. Co. v. Locke*, 112 Ind. 404, 2 Am. St. Rep. 193, 14 N. E. 391.) In order that liability may attach for injury occasioned by something not inherently dangerous or defective which is found upon the grounds of, or in use by, one who is under a qualified obligation to the injured person, it must be shown that the defendant either knew, or that by the exercise of such reasonable skill, vigilance and sagacity as are ordinarily possessed and employed by persons experienced in the particular business to which the thing pertains, he should have known, of its dangerous and defective condition, and that the natural and probable consequence of its use would be to produce injury to someone. (*Wabash etc. Ry. Co. v. Locke*, *supra*; *Curran v. Warren etc. Mfg. Co.*, 36 N. Y.

153; *Nason v. West*, 78 Me. 253, 3 Atl. 911; *Dubois v. Kingston*, 102 N. Y. 219, 55 Am. Rep. 804, 6 N. E. 273.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The plaintiff, while leaving the Star Theater in Billings, was injured by a billboard falling against her. She brought this action to recover damages and secured a favorable verdict. The lower court granted a new trial, and plaintiff appealed from the order.

The motion for a new trial was made upon all the statutory [1, 2] grounds, and the order sustaining it is general in terms. If the order can be justified upon any of the grounds, it must be approved. (*Scott v. Waggoner*, 48 Mont. 536, L. R. A. 1916C, 491, 139 Pac. 454.) One ground of the motion is insufficiency of the evidence to justify the verdict. There was not any evidence to disclose what caused the billboard to fall, and plaintiff relied upon a presumption of negligence invoking the maxim *res ipsa loquitur*. The defendants offered evidence tending to show the degree of care exercised by them with reference to the billboard. The presumption on the one hand, and the evidence on the other, at least raised an issue as to whether defendants were guilty of actionable negligence. The burden was upon the plaintiff to sustain the affirmative of this issue by a preponderance of the evidence, and though the presumption had the force and effect of evidence, if, upon the whole case made, the trial court was of the opinion that plaintiff had failed to sustain the burden thus imposed, the duty devolved upon it to grant a new trial. (*Hamilton v. Monidah Trust*, 39 Mont. 269, 102 Pac. 335.) The application was addressed to the sound, legal discretion of the court below, and its order is subject to review only for an abuse of that discretion. An examination of the record fails to disclose any such abuse, and for this reason the order is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

FUSSELMAN, APPELLANT, v. YELLOWSTONE VALLEY
LAND & IRRIGATION CO., RESPONDENT.

(No. 3,731.)

(Submitted January 22, 1917. Decided February 16, 1917.)

[163 Pac. 473.]

*Negligence—Trespassing Children—Turntable Doctrine—Com-
plaint—Circumstantial Evidence—New Trial—Newly Discov-
ered Evidence—Affidavit—Insufficiency.*

Real Property—Trespassers—Duty Owing by Owner.

1. Anyone who goes upon the private property of another without lawful authority or without permission or invitation, express or implied, is a trespasser to whom the owner owes no legal duty, until his presence is discovered, other than to refrain from wanton or willful acts which occasion injury.

Same—Presence upon by Invitation—Duty of Owner.

2. A person upon the private property of another by invitation, express or implied, is there rightfully, and to him the land owner owes the positive duty to exercise reasonable care for his safety.

Same—Turntable Doctrine—Upon What Based.

3. Liability under the doctrine of the turntable cases *held* to be founded upon the theory of implied invitation.

Actionable Negligence—Complaint—Contents.

4. Actionable negligence arises only from a breach of legal duty; and to state a cause of action for damages resulting from negligence, the complaint must disclose, by a statement of facts—not legal conclusions—the duty, a breach and resulting damages.

Same—Turntable Doctrine—What Complaint must Contain.

5. To state a cause of action under the doctrine of the turntable cases, it is not enough for the complaint to show that the premises were attractive to children or that children generally were attracted thereto, but it must show that the attraction lured the injured child there with the result complained of, the facts pleaded disclosing the causal connection between the negligent act and the injury.

[As to liability for injuries to trespassing children, see note in 49 Am. St. Rep. 416.]

Same—Evidence—Insufficiency.

6. Evidence in an action for the drowning of a child in the canal of an irrigation company, *held* insufficient to support a verdict on the theory that it fell in where the canal crossed a street, which should have been, but was not, covered, as required by a city ordinance.

Same—Circumstantial Evidence—When Sufficient.

7. Where circumstantial evidence is relied on to establish actionable negligence, the circumstances must tend directly to establish the cause of action; where they have an equal or stronger tendency

For authorities discussing the question of duty of property owner to trespassing child, see note in 32 L. R. A. (n. s.) 559.

On the question of origin of the doctrine of attractive nuisance, generally, see note in 19 L. R. A. (n. s.) 1094.

to support some other theory inconsistent with the one upon which plaintiff relies, the burden resting upon him is not satisfied.

New Trial—Newly Discovered Evidence—When Insufficient.

8. One moving for a new trial on the ground of newly discovered evidence, must in his affidavit show that he exercised due diligence before trial to procure the newly discovered evidence by stating the particular efforts he made in that regard; the bare statement that he made due inquiry being insufficient.

Appeal from District Court, Park County, in the Ninth Judicial District; Ben B. Law, Judge of the Ninth District, presiding.

ACTION by E. W. Fusselman against the Yellowstone Valley Land & Irrigation Company. From an adverse judgment and an order denying a new trial, plaintiff appeals. Affirmed.

Messrs. Walsh, Nolan & Scallon, for Appellant, submitted a brief; *Mr. C. B. Nolan* argued the cause orally.

As to the attractiveness of the place for children, so as to require the company to exercise reasonable precautions against children of tender years falling into the canal: At the outset, we admit that on this proposition the cases seem to be absolutely in conflict. We believe, however, that the best reasoning favors our contention that the company was required to exercise reasonable care to prevent the drowning of children in the canal, when we consider the conditions locally and the accidents which from time to time occurred on account of children falling into the ditch. (Shearman & Redfield on Negligence, sec. 705; Thompson on Negligence, secs. 1030, 1031; *City of Pekin v. McMahon*, 154 Ill. 141, 45 Am. St. Rep. 114, 27 L. R. A. 206, 39 N. E. 484; *Tucker v. Draper*, 62 Neb. 66, 54 L. R. A. 321, 86 N. W. 917; *Price v. Atchison Water Co.*, 58 Kan. 551, 62 Am. St. Rep. 625, 50 Pac. 450; *Franks v. Southern Cotton Oil Co.*, 78 S. C. 10, 12 L. R. A. (n. s.) 468, 58 S. E. 960; *Donk Bros. Coal & Coke Co. v. Leavitt*, 109 Ill. App. 385; *Tucker v. Draper*, 62 Neb. 66, 54 L. R. A. 321, 86 N. W. 917; *Palermo v. Orleans Ice Mfg. Co.*, 130 La. 833, 40 L. R. A. (n. s.) 671, 58 South. 589; *Bjork v. Tacoma*, 76 Wash. 225, 48 L. R. A. (n. s.)

331, 135 Pac. 1005; *Capp v. St. Louis*, 251 Mo. 345, Ann. Cas. 1915C, 245, 46 L. R. A. (n. s.) 731, 158 S. W. 616.) .

The evidence, though circumstantial, was sufficient to warrant the submission of the case to the jury upon the theory that the child fell in at a point on Yellowstone Street, which the defendant company had, in violation of a city ordinance, neglected to cover over. (*Choctaw etc. R. Co. v. McDade*, 191 U. S. 64, 48 L. Ed. 96, 24 Sup. Ct. Rep. 24; *Philadelphia & R. R. Co. v. Huber*, 128 Pa. St. 63, 5 L. R. A. 439, 18 Atl. 334; *Jones v. New York etc. R. R. Co.*, 92 N. Y. 628; *Crucible Steel Forge Co. v. Moir*, 219 Fed. 151, 153, 135 C. C. A. 49, 8 N. C. C. A. 1006; *Cincinnati etc. R. Co. v. Jones*, 192 Fed. 769, 47 L. R. A. (n. s.) 483, 113 C. C. A. 55, 3 N. C. C. A. 840; *Felton v. Newport*, 105 Fed. 332, 44 C. C. A. 530; *Pittsburgh, C. C. & St. L. R. Co. v. Scherer*, 205 Fed. 356, 123 C. C. A. 484.)

Mr. Fred L. Gibson and *Messrs. Miller & O'Connor*, for Respondent, submitted a brief; *Mr. Gibson* argued the cause orally.

So far as Montana has adopted the rule announced in the "turntable cases," it has limited it to injuries caused by "an unguarded, dangerous machine or other dangerous thing peculiarly attractive to children of the class to which the injured one belongs." (*Gates v. Northern Pac. Ry. Co.*, 37 Mont. 103, 94 Pac. 751.) An open flume maintained on defendant's land is not such a dangerous appliance attractive to children as to render defendant liable for the death of a child three years and nine months of age, by being carried down the flume while playing near the same as a trespasser. (*Salladay v. Old Dominion Copper Min. Co.*, 12 Ariz. 124, 100 Pac. 441.) And the great majority of cases in which it has been sought to extend the doctrine of the "turntable cases" to include dangers from ponds, reservoirs and waterways hold that such dangers are not such as are within the meaning of the turntable case. (*Sullivan v. Huidekoper*, 27 App. D. C. 154, 5 L. R. A. (n. s.) 263; *Schauf's Admr. v. Paducah*, 106 Ky. 228, 90 Am. St. Rep. 220, 50 S. W.

42; *Overholt v. Vieths*, 93 Mo. 422, 3 Am. St. Rep. 557, 6 S. W. 74; *Moran v. Pullman Palace Car Co.*, 134 Mo. 641, 651, 56 Am. St. Rep. 543, 33 L. R. A. 755, 36 S. W. 659; *Greene v. Linton*, 7 Misc. Rep. 272, 27 N. Y. Supp. 891; *Klix v. Nieman*, 68 Wis. 271, 276, 60 Am. Rep. 854, 32 N. W. 223; *McCabe v. American Woolen Co.*, 124 Fed. 283, 132 Fed. 1006, 65 C. C. A. 59.)

The enactment of ordinance No. 99 and its acceptance by the grantee of the privileges therein contained under the terms therein set forth constituted merely a contract between the city and the grantee, and the obligation imposed upon the grantee (defendant) of covering its ditch in the streets and alleys is not an obligation or duty imposed by law, for the violation of which third persons have a right of action for damages caused thereby (*Melville v. Butte-Balaklava Copper Co.*, 47 Mont. 1, 130 Pac. 441; *Conway v. Monidah Trust*, 47 Mont. 269, L. R. A. 1915E, 500, 132 Pac. 26), but is an obligation imposed upon the grantee of the easement by the contract, and the violation of the contract in this particular is one with which third persons have nothing to do. The same rules govern contracts made by municipalities as control agreements made by individuals.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In 1913 the Yellowstone Valley Land & Irrigation Company maintained a canal for conveying water from the Yellowstone River for irrigation purposes. The canal passed through a portion of the city of Livingston and along and across many streets and alleys. Permission to run the canal through the city had been obtained, and Ordinance No. 99 had been adopted defining the rights and duties of the company within the city. Among other things, it was required to keep the canal covered wherever it ran in or across a street or alley, but this duty had been neglected, and there was not any covering over the canal where it crossed Yellowstone Street or Gallatin Street or in the vicinity of the intersection of those streets, except a bridge fourteen feet in length near the center of Yellowstone Street. On May 23,

1913, the dead body of Birdena Fusselman was taken from the canal at a point down the canal and 1,100 feet east of the Yellowstone Street bridge. This action was brought by the father of the deceased to recover damages. Issues were framed and a trial had. At the conclusion of the evidence the district court directed a verdict for the defendant, and plaintiff appealed from the judgment entered thereon and from an order denying his motion for a new trial. Appellant advances two theories, upon either of which he insists that a case was made for the jury.

1. It is first contended that even though the deceased was upon the private property of the defendant at the time she fell into the canal, liability may nevertheless attach if the canal, as located with the water flowing in it, was peculiarly attractive to children of tender years, if it was dangerous, if small children were accustomed to play about it and were likely to fall into it and be drowned, and if these facts were known to the defendant or should have been known to it and reasonable care was not taken to prevent injury. In other words, it is sought to invoke the rule announced in *Sioux City & P. R. Co. v. Stout*, 17 Wall. (84 U. S.) 657, 21 L. Ed. 745.

The doctrine of the turntable cases proceeds upon the assumption that the injured party, if an adult, would have been a trespasser, but because of his tender years and indiscretion is not subject to the rule of liability applicable to trespassers. [1] Anyone who goes upon the private property of another without lawful authority or without permission or invitation, express or implied, is a trespasser to whom the land owner owes no legal duty until his presence is discovered. He is only required to refrain from wanton or willful acts which occasion injury. (*Egan v. Montana Cent. Ry. Co.*, 24 Mont. 569, 63 Pac. [2] 831.) A person upon the private property of another by invitation, express or implied, is there rightfully, and to him the land owner owes the positive duty to exercise reasonable care for his safety. (*Montague v. Hanson*, 38 Mont. 376, 99 Pac. 1063.) It is not contended that the defendant or any officer or agent of it knew of the presence of Birdena Fusselman upon the

right of way or along the canal immediately, or at any time, before her death, or that her death resulted from any wanton or willful acts of the defendant. Neither is there any contention made that the company ever expressly invited the deceased to come upon its property; so that the only possible theory upon which liability may attach under this view of the case is that the deceased was at the canal pursuant to an implied invitation extended to her by the canal company, and that the invitation was to be implied from the acts of the defendant in maintaining the canal under the circumstances disclosed.

In passing, it may be said that no other subject within the domain of the law has given rise to greater divergence of judicial opinion than the doctrine of the *Stout Case*. In some jurisdictions it is repudiated altogether; in others applied strictly; in others adopted in a more or less modified form; while in others it has been extended to such a variety of cases that it has lost its original identity and has become a new rule of the substantive law of negligence. The courts which give recognition to the doctrine are not agreed upon the principle which underlies it and encounter difficulty in defining the doctrine itself. By some of these courts it is treated as an exception to the general rule of nonliability to trespassers—an exception born of necessity and applied out of consideration for the irresponsibility of infancy. Others invoke the doctrine only in cases where an invitation can be implied from the acts of the land owner, upon the theory that, “what an express invitation would be to an adult, the temptation of an attractive plaything is to a child of tender years.” (*Keffe v. Milwaukee etc. Ry. Co.*, 21 Minn. 207, 18 Am. Rep. 393.) So much has been written upon the subject that we shall not attempt to add anything new to the discussion. To review the decided cases is useless, and to reconcile them is impossible. An extended reference to them will be found in *Bottum's Admr. v. Hawks*, 84 Vt. 370, Ann. Cas. 1913A, 1025, 35 L. R. A. (n. s.) 440, 79 Atl. 858, and in the notes to the same case in Ann. Cas. 1913A, 1032.

In the trial of the *Stout Case*, Judge Dillon instructed the jury that notwithstanding the child was upon the private property of the company at the time he was injured, liability would attach if the jury found: (a) That the turntable, in its then condition, situation, and place, was a dangerous machine, which, if left unguarded and unlocked, would be likely to cause injury to children; (b) that the company knew or ought to have known that children resorted to the turntable to play, and that they would likely be injured by it; and (c) that the company employed no means to keep children away or to prevent accidents to them. (*Stout v. Sioux City & P. R. Co.*, 2 Dill. 294, Fed. Cas. No. 13,504.) In the supreme court the instructions were approved as sound and judicious, and reference is made to the rule of reasonable care—the rule which measures the duty of the land owner to one rightfully upon his property. The court did not assume to state a new rule of law, but sought justification in principles announced and applied in decided cases to which reference was made, among them *Lynch v. Nurdin*, 1 Q. B. 29, 41 E. C. L. 422. The facts of that case were that the defendant's servant left a horse and cart unattended in the street. The plaintiff, a child of tender years, climbed upon the cart in play. Another child struck the horse, causing it to start abruptly, whereby the plaintiff was thrown to the ground and injured. The defendant was held liable, though no stress was laid upon the fact that the horse and cart were in a public street. Upon the question of negligence Chief Justice Denman said: "For if I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first." And, disposing of the contention that the negligence of the plaintiff in mounting the cart and so committing a trespass had contributed to the injury, he observed: "The answer is that, supposing that fact ascertained by the jury, but to this extent: That it merely

indulged the natural instinct of a child in amusing himself with the empty cart and deserted horse, then we think that the defendant cannot be permitted to avail himself of that fact. The most blamable carelessness of his servant having tempted the child, he ought not to reproach the child with yielding to that temptation. He has been the real and only cause of the mischief."

Though in the *Stout Case* particular emphasis was not laid upon the peculiar attractiveness of the turntable, and the foundation principle upon which liability was made to depend was not sharply defined, the language employed and the references given seem to require the conclusion that the attractiveness of the machine was deemed to be an essential element, and that the theory of implied invitation must have prompted the conclusion reached. The *Stout Case* was decided in 1873. Later a case presenting substantially the same facts came before the supreme court of Minnesota (*Keffe v. Milwaukee etc. Ry. Co.*, above), and the rule of liability was there made to rest upon the theory of implied invitation. Among other things the court said: "The defendant therefore knew that by leaving this turntable unfastened and unguarded, it was not merely inviting young children to come upon the turntable, but was holding out an allure-ment, which, acting upon the natural instincts by which such children are controlled, drew them by those instincts into a hidden danger; and having thus knowingly allured them into a place of danger, without their fault (for it cannot blame them for not resisting the temptation it has set before them), it was bound to use care to protect them from the danger into which they were thus led, and from which they could not be expected to protect themselves."

In his work on Torts, Judge Cooley referred approvingly to the decision in the *Keffe Case*, and under the title "Invasion of Rights in Real Property" said: "Every retail dealer impliedly invites the public to enter his shop for the examination of his goods, that they may purchase them if they see fit. * * * So every man, by implication, invites others to come to his house

as they may have proper occasion, either of business, of courtesy, for information, etc. * * * In the case of young children and other persons not fully *sui juris*, an implied license might sometimes arise when it would not in behalf of others. Thus, leaving a tempting thing for children to play with exposed, where they would be likely to gather for that purpose, may be equivalent to an invitation to them to make use of it." (Cooley on Torts, 303.)

In the first edition of Thompson on Negligence, published in 1880, the author, referring to *Townsend v. Wathen*, 9 East, 297, and *Stout v. Railroad Co.*, above, said: "It would be a barbarous rule of law that would make the owner of land liable for setting a trap thereon, baited with stinking meat, so that his neighbor's dog, attracted by his natural instincts, might run into it and be killed; and which would exempt him from liability for the consequences of leaving exposed and unguarded on his land a dangerous machine, so that his neighbor's child, attracted to it and tempted to intermeddle with it by instincts equally strong, might thereby be killed or maimed for life." (1 Thompson on Negligence, 305.)

In *Union Pac. Ry. Co. v. McDonald*, 152 U. S. 262, 38 L. Ed. 434, 14 Sup. Ct. Rep. 619, the principles of the *Stout Case* were approved and applied. *Lynch v. Nurdin* was again analyzed and relied upon, and the language from that case, from *Keffe v. Milwaukee etc. Ry. Co.*, and from Cooley and Thompson above was quoted to sustain the position taken. It should now be deemed to be settled, so far as the federal courts are concerned, that the doctrine of the *Stout Case*, as amplified in the *McDonald Case*, is the law upon the subject; that the attractive character of the dangerous instrumentality which causes the injury is an essential element of the doctrine, and that the doctrine has its foundation in the theory of implied invitation.

Lynch v. Nurdin was decided in 1841. In 1909 *Cooke v. Midland G. W. Ry. Co.*, involving the question of the liability of the railway company for an injury to a child while playing upon an unlocked turntable on the defendant's premises, came before

the House of Lords. The defendant was held liable upon the theory of implied invitation, and *Lynch v. Nurdin* was relied upon as direct authority for the doctrine announced that a land owner who maintains on his premises a dangerous machine peculiarly attractive to children of immature years, and who knows that such children are accustomed to play about and upon it and are likely to be injured by it, owes to such children the duty to exercise ordinary care for their safety. ([1909] App. Cas. 229, 15 Ann. Cas. 557.) The doctrine was invoked in this court for the first time in *Driscoll v. Clark*, 32 Mont. 172, 80 Pac. 1, 373, but we held that the facts pleaded did not bring the case within the rule, though the doctrine itself received the tacit approval of a majority of the court. The same conclusion was reached in *Gates v. Northern Pac. Ry. Co.*, 37 Mont. 103, 94 Pac. 751, and in *Nixon v. Montana W. & S. W. Ry. Co.*, 50 Mont. 95, Ann. Cas. 1916B, 299, 145 Pac. 8. In *Martin v. Northern Pac. Ry. Co.*, 51 Mont. 31, 149 Pac. 89, we reviewed an instruction of the trial court designed to announce and apply the doctrine, but held that it omitted an essential element. In every one of these cases we proceeded upon the assumption that the doctrine is grounded upon the theory of implied invitation, and though it may not appear altogether logical to imply an invitation where none was intended to be extended, still in this jurisdiction the position is fortified somewhat by the rule of law crystallized in the statute, which declares that it will be presumed "that a person intends the ordinary consequence of his voluntary act." (Rev. Codes, sec. 7962.) This rule is applied in civil cases, and though the presumption is a disputable one, it furnished sufficient foundation for a *prima facie* case until contradicted.

The doctrine of the turntable cases is the rule of law in England, in our federal courts, in by far the greater number of the state courts where it has been considered, and has received the tacit approval of the majority of this court. We are satisfied that justification for the doctrine can be found only in the theory of implied invitation, and upon the assumption that in a proper case the doctrine will be applied in this jurisdiction

upon that theory, it is insisted by counsel for respondent that the complaint does not state facts sufficient to bring the present case within the doctrine.

It is the rule, recognized generally, that actionable negligence arises only from a breach of legal duty, and to state a cause of action for damages resulting from negligence, it is necessary that the complaint disclose the duty, the breach, and the resulting damages. The facts, and not legal conclusions, must be stated, and it is therefore necessary to set forth sufficient facts from which it can be said, as a matter of law, that the defendant owed to the injured party a duty arising from some legal relation existing at the time of the injury. It is not [5] sufficient to say that the defendant impliedly invited the deceased to come upon the property. An invitation not accepted or acted upon cannot create any legal relationship whatever. Neither is it sufficient to show that children generally were attracted to the dangerous instrumentality, in order to make out a case under the turntable doctrine as we have defined it. To impose liability upon the defendant for the death of Birdena Fusselman it must be made to appear, among other things, that a legal duty was owed to her, and this could arise only from the maintenance of a dangerous instrumentality peculiarly attractive to children of tender years and which did lure or attract her to her death. It is not sufficient to charge negligence in the abstract. The breach of duty relied upon must have been the proximate cause of the injury, and the facts pleaded must disclose the causal connection between the defendant's negligent act and the injury complained of. Though the canal may have been ever so attractive to children, unless it was that attraction which lured the deceased to her death, the doctrine would have no application.

It is a general rule of pleading in actions for damages for injuries received upon the defendant's property that the complaint must disclose by what right the injured party was upon the premises. (14 Ency. Pl. & Pr. 339; 29 Cyc. 567.) In failing to allege that Birdena Fusselman was attracted to the canal

or that by reason of its peculiar attractiveness she went upon the canal and met her death, the complaint fails to state a cause of action under the doctrine of the turntable cases.

2. The other theory adopted by the appellant is that the child [6] fell into the canal while she was in Yellowstone Street near the bridge and at a point where the canal was not protected by a covering or barrier; that she was drowned and her body carried by the water to the point where it was found; and upon this theory it is sought to fasten liability upon the company for its negligence in failing to comply with the city ordinance.

Since the ordinance required the canal to be covered only where it ran in or across a street or alley, the burden was cast upon the plaintiff, in the maintenance of this theory, to prove that the child was in a street or alley at the time she fell into the canal. To sustain this burden, plaintiff offered evidence of the following facts:

The Fusselman home is 700 feet south of the Yellowstone Street bridge, and 226 feet south and west of the bridge is a garage. About 5:30 o'clock in the afternoon of May 23 the deceased, three years and three months old, and her playmate, Genevieve Rowe, four years old, were taken from near the Fusselman residence to the garage, and soon afterward were seen playing in Gallatin Street, about midway between the garage and the bridge, picking small white flowers—referred to by some of the witnesses, as daisies. About 6 o'clock the Rowe child returned to its home near the garage apparently much excited. The absence of the deceased was noticed about the same time, and at 6:30 the body was recovered from the canal at a flume where it had lodged against a screen. Mrs. Rowe, a witness for plaintiff, testified that, aiding in the search for the missing child, she and Mrs. Fusselman went to the canal in Yellowstone Street. Her testimony then continues: "We went just a few feet west of the bridge and found on the edge of the bank there quite a bunch of white flowers—I believe they call them lilies. Q. Do you know whether or not they were fresh looking? A. They were quite fresh. I should say it was three and one-half or four feet

west of the bridge we found those little lilies, and they were right on the bank. Those lilies or lilies like them were growing on Gallatin Street at that time around our barn and all over the little flat where the street is."

It is insisted that from these facts and circumstances the inference is a legitimate one that after picking flowers in Gallatin Street, the two children proceeded on to the Yellowstone Street bridge, that the deceased fell into the canal near the bridge, and that the flowers found by Mrs. Rowe were dropped by the deceased. In their brief, counsel for appellant refer to the *freshly picked daisies* found by Mrs. Rowe as furnishing strong circumstantial evidence that the child fell into the canal at the point where the flowers were found; but it is to be observed that Mrs. Rowe was not asked if the flowers were plucked, or were growing at the place indicated, and it is only an inference from her testimony that they were picked flowers, and another inference that the lilies to which she referred were the daisies mentioned by other witnesses. The allegations of the complaint and the proof are that children of the neighborhood were accustomed to play along the canal and on the streets and unoccupied lots along or near the canal, and if we are to assume that the flowers found by Mrs. Rowe had been plucked recently, what justification can there be for saying that they were left there by the deceased rather than by someone else? Considering that the child's body was found 1,100 feet from the place where the flowers were, that she could have approached the canal at any point within that distance, and that it was unguarded throughout, we think it could not be more nor less than a guess to say from this evidence that the accident occurred at or near the bridge rather than at some other point, not in a street or alley.

Actionable negligence may be shown by circumstantial evidence, but the circumstances must tend directly to establish the cause of action. The burden of proof is upon the plaintiff, and is not satisfied if the conclusion rests merely upon conjecture or speculation, or if the facts and circumstances have an

equal or stronger tendency to support some other theory inconsistent with the one upon which plaintiff relies. (*Shaw v. New Year Gold Mines Co.*, 31 Mont. 138, 77 Pac. 515; *Gilmore v. Ostronich*, 48 Mont. 305, 137 Pac. 378.)

3. Error is predicated upon the refusal of the court to grant [8] a new trial upon the ground of newly discovered evidence. Maude Schanelec and Gertrude Husted each made affidavit to facts discovered by them on the evening of May 23, 1913—facts which would have been material to plaintiff in the trial of this case. In his affidavit in support of the motion, plaintiff says: "I am the plaintiff in the above-entitled action. I made diligent inquiry before the trial of said cause took place to obtain evidence to show that my little girl fell into the ditch in which she was drowned, and especially as to the place where she did fall in. The only evidence that I was able to obtain as to the place where the child fell in was the evidence of Mrs. Rowe, who testified to finding a bunch of lilies on the bank of the ditch a short distance west of the bridge crossing Yellowstone Street. That since the trial of said cause I learned that Maude Schanelec and Gertrude Husted had some information as to where the child fell into the ditch, and immediately on getting that information I went to see them and learned from them as to the footprints on the bank, and also as to the markings on the edge of the ditch, as shown by their affidavits. This information came to me, as already stated, for the first time after the case was tried."

In *State v. Matkins*, 45 Mont. 58, 121 Pac. 881, this court reviewed at length the subject now under consideration, stated the reasons which impel courts to look with disfavor upon an application for a new trial based upon newly discovered evidence, and reiterated the rules governing such an application. One of the rules recognized and insisted upon by the authorities everywhere is that the moving party must disclose that he exercised due diligence to procure the newly discovered evidence before the trial. "The particular efforts which were made to discover the testimony before the trial must be stated, giving the

circumstances, and the names of persons of whom inquiry was made. It is not sufficient merely to aver that affiant used 'due diligence' or 'reasonable diligence,' or to employ equivalent expressions, as the court must determine the question of diligence from the facts related in the affidavit of the applicant." (14 Ency. Pl. & Pr. 824; *Nicholson v. Metcalf*, 31 Mont. 276, 78 Pac. 483.)

Aside from any consideration of the counter-affidavits which were presented, the showing made falls short of the requirements of these rules. It would not be sufficient cause for reversal that the members of this court, if sitting at *nisi prius*, might have viewed the application in a more favorable light. The motion was addressed to the sound, legal discretion of the trial court, and we cannot say from this record that the discretion was abused.

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

SORENSEN, RESPONDENT, v. NORTHERN PACIFIC RY. CO.,
APPELLANT.

(No. 3,735.)

(Submitted January 23, 1917. Decided February 16, 1917.)

[163 Pac. 500.]

Personal Injuries—Railroads—Federal Liability Act—Master and Servant—Insufficient Assistance—Culpable Negligence—Assumption of Risk—Verdict Against Law.

Personal Injuries—Railroads—Federal Liability Act—Assumption of Risk.

1. The defense of assumption of risk may be interposed as a bar in an action, brought under the Federal Employers' Liability Act, when the personal injury or death complained of has been caused by a hazard which is incident to the particular business, or by a haz-

ard which, though brought about by the failure of the employer to provide a safe place to work and safe appliances to work with, the employee knew or should have known of and appreciated.

[As to assumption of risk under Federal Employers' Liability Act, see note in Ann. Cas. 1915B, 481.]

Same—Master and Servant—Injury Due to Insufficient Assistance.

2. The failure of an employer to provide a sufficient number of competent employees to perform the work in hand with reasonable safety to all those engaged in its accomplishment is culpable negligence.

Same—Servant Overtaxing Strength—Liability of Master.

3. *Held* that the general rule that, being the best judge of his own muscular capacity, an employee who undertakes to lift, or assist in lifting, a heavy object while acting in the line of his duty, whether under the direct supervision of his superior or not, assumes the risk of injury due to overtaxing his strength, *held* not to apply where the injured person is of immature years or inexperienced in the work he was engaged in at the time.

Same—Assumption of Risk—Exception.

4. A servant does not, as a matter of law, assume a risk if the hazard incident to his employment requires knowledge or judgment not possessed by men of ordinary observation.

Same—Injury by Heavy Lifting—Liability of Master.

5. *Held*, under the above rules, that a section-hand, twenty-three years of age, without previous experience in lifting heavy rails, who while engaged in lifting one such rail thirty feet in length and weighing about 990 pounds, assisted by two others, a young man of nineteen and an old man of sixty-two, sustained a rupture, was not as a matter of law chargeable with assumption of risk, but that the question was properly submitted to the jury.

Same—Appreciation of Risk—Presumptions.

6. From the fact that plaintiff had, a short time before he was injured, seen four men lift another rail of the same size and weight, but under different conditions, he could not be presumed, as a matter of law, to have gained appreciative knowledge that the weight of the rail in the lifting of which he was ruptured was beyond the capacity of three men.

Same—Verdict Against Law—When not.

7. Since, under the evidence, the jury could properly have found either for or against the contention of appellant that plaintiff assumed the risk, their finding against it was not contrary to the law as declared in the instructions.

Same—Sufficient Assistance—Duty of Master.

8. The duty of the employer to provide, among other things, a sufficient number of men to perform the work in hand with reasonable safety to all those engaged in its accomplishment, is not discharged by providing such number in the first place, but requires that it be maintained during the progress of the work and each particular part of it.

Appeal from District Court, Gallatin County; Ben B. Law, Judge.

ACTION by William Sorenson against the Northern Pacific Railway Company. From a judgment for plaintiff, and an order denying it a new trial, defendant appeals. Affirmed.

Messrs. Gunn, Rasch & Hall and *Mr. W. S. Hartman*, for Appellant, submitted a brief; *Mr. E. M. Hall* argued the cause orally.

The Federal Employers' Act abolishes the defense of the assumption of risk only when the violation by the carrier of a federal statute enacted for the safety of employees contributed to the death or injury of an employee. In all other cases such assumption of risk shall have its former effect as a complete bar to the action. (*Seaboard Air Line Ry. v. Horton*, 233 U. S. 492, Ann. Cas. 1915B, 475, L. R. A. 1915C, 1, 58 L. Ed. 1062, 34 Sup. Ct. Rep. 635, 8 N. C. C. A. 834; *Southern R. Co. v. Crockett*, 234 U. S. 725, 58 L. Ed. 1564, 34 Sup. Ct. Rep. 897; *Oberlin v. Oregon-Wash. R. & Nav. Co.*, 71 Or. 177, 142 Pac. 554; *Farley v. New York, N. H. & H. R. Co.*, 88 Conn. 409, 91 Atl. 650; *Truesdell v. Chesapeake & O. R. Co.*, 159 Ky. 718, 169 S. W. 471; *New York etc. R. Co. v. Vizvari*, 210 Fed. 118, L. R. A. 1915C, 9, 126 C. C. A. 632; *Lauer v. Northern Pac. R. Co.*, 83 Wash. 465, 145 Pac. 606; *St. Louis & S. F. R. Co. v. Snowden* (Okl.), 149 Pac. 1083.) The above law is so construed even though a state statute has abolished the defense of assumption of risk in cases other than those covered by the federal Act. A section-hand working on the track of an interstate road is engaged in interstate commerce. (*Pedersen v. Delaware etc. R. Co.*, 229 U. S. 146, Ann. Cas. 1914C, 153, 57 L. Ed. 1125, 33 Sup. Ct. Rep. 648, 3 N. C. C. A. 779; *Zikos v. Oregon R. & Nav. Co.*, 179 Fed. 893; *Colasurdo v. Central R. R.*, 180 Fed. 832; affirmed in *Central R. Co. of N. J. v. Colasurdo*, 192 Fed. 901, 113 C. C. A. 379; *Louisville & N. R. Co. v. Kemp*, 140 Ga. 657, 79 S. E. 558.)

Employees assume the risk of injury from lifting heavy objects. (17 Am. & Eng. Ann. Cas. 240; *Stenvog v. Minnesota Transfer R. Co.*, 108 Minn. 199, 17 Ann. Cas. 240, 25 L. R. A.

(n. s.) 362, 121 N. W. 903; *Walsh v. St. Paul & Duluth R. Co.*, 27 Minn. 367, 8 N. W. 145; *Worlds v. Georgia R. Co.*, 99 Ga. 283, 25 S. E. 646; *Ferguson v. Phoenix Cotton Mills*, 106 Tenn. 236, 61 S. W. 53; *Texas & P. R. Co. v. Miller*, 36 Tex. Civ. 240, 81 S. W. 535; *White v. Owosso Sugar Co.*, 149 Mich. 473, 112 N. W. 1125; *American Brass Mfg. Co. v. Philippi*, 103 Mo. App. 47, 77 S. W. 475, 765.)

In a number of the cases cited above, where it is held the risk was assumed, the plaintiff did not ask for additional help nor protest in any manner when directed to lift the heavy object, while in the case at bar the plaintiff before lifting the first rail asked for assistance from his brother, which request, so far as knowledge on the part of plaintiff is concerned, was in effect the same as if he had suggested to the foreman that more men were needed, and then voluntarily proceeded to lift the object. (See, also, *St. Louis & S. F. R. Co. v. Snowden* (Okl.), 149 Pac. 1083; *Nephew v. Whitehead*, 123 Mich. 255, 81 N. W. 1083; *Haviland v. Kansas City etc. R. Co.*, 172 Mo. 106, 72 S. W. 515; *Bryan v. Southern Ry. Co.*, 128 N. C. 387, 38 S. E. 914; *Missouri O. & G. Ry. Co. v. Black* (Tex. Civ.), 176 S. W. 755.)

An employee is the best judge of his own lifting capacity, and the risk is upon him not to overtax it. (*Haviland v. Kansas City etc. R. Co.*, 172 Mo. 106, 72 S. W. 515; *Ferguson v. Phoenix Cotton Mills*, 106 Tenn. 236, 61 S. W. 53.) The fact that the employee is acting under the orders of his superior at the time does not alter the rule, even though he may have reason to believe that disobedience of the order will result in his dismissal. (*Worlds v. Georgia R. Co.*, 99 Ga. 283, 25 S. E. 646; *Haviland v. Kansas City etc. R. Co.*, 172 Mo. 106, 72 S. W. 515; *Leitner v. Grieb*, 104 Mo. App. 173, 77 S. W. 764.)

Messrs. Keister & Bath, for Respondent, submitted a brief; *Mr. H. D. Bath* argued the cause orally.

It is the duty of the master to provide sufficient help. (*Supple v. Agnew*, 191 Ill. 439, 61 N. E. 392.) This court has adopted the

ruling in *Supple v. Agnew*, 191 Ill. 439, 61 N. E. 395, in *Verlinda v. Stone & Webster E. Corp.*, 44 Mont. 223, 119 Pac. 573. The rule of law which enjoins upon the master the duty to provide his servants with reasonably safe instrumentalities embraces the duty of providing proper and sufficient help and assistance, so that they may perform the work with reasonable safety. (*Peterson v. American Grass Twine Co.*, 90 Minn. 343, 96 N. W. 913; *Flike v. Boston & A. R. Co.*, 53 N. Y. 549, 13 Am. Rep. 545; *Booth v. Boston & A. R. Co.*, 73 N. Y. 38, 29 Am. Rep. 97; *Wright v. Southern Pac. Co.*, 14 Utah, 383, 46 Pac. 374; *Johnson v. Ashland Water Co.*, 71 Wis. 553, 555, 5 Am. St. Rep. 243, 37 N. W. 823.) This duty is an absolute and nondelegable duty. (*Alabama G. S. R. Co. v. Vail*, 142 Ala. 134, 110 Am. St. Rep. 23, 38 South. 124.) The fellow-servant doctrine will not be given the effect of defeating recovery against the master for an injury to a servant when it appears that the injury was due to the master's failure to furnish sufficient help. (*Boden v. Demwolf*, 56 Fed. 846.)

If injury results to a servant from the operation of a railroad train without sufficient help, the company is liable. (*Georgia Pac. Ry. Co. v. Propst*, 90 Ala. 1, 7 South. 635.) A master will be held responsible for his failure to employ enough competent persons to do his work safely at all times, as respects others employed. (*Hill v. Big Creek Lumber Co.*, 108 La. 162, 58 L. R. A. 346, 32 South. 372; *Louisville & N. R. Co. v. Semones*, 21 Ky. Law Rep. 444, 51 S. W. 612; *Bonn v. Galveston, H. & S. A. Ry. Co.* (Tex. Civ.), 82 S. W. 808.)

It will not be assumed that the employee knew, at the time of his injury, that the number of men employed to assist him was insufficient to do the work with reasonable safety to himself. (*McMullen v. Missouri K. & T. Ry. Co.*, 60 Mo. App. 231.) Whether or not the master in the particular case performed his duty of employing a sufficient number of men to do the particular work with reasonable safety to the employees is a question of fact to be determined by the jury. (*Southern Pac. Co. v. Lafferty*, 57 Fed. 536, 537, 6 C. C. A. 474, 15 U. S.

App. 193; *Denver S. P. & P. R. Co. v. Wilson*, 12 Colo. 20, 20 Pac. 340; *Supple v. Agnew*, 191 Ill. 439, 61 N. E. 392; *Harvey v. New York, C. & H. R. R. Co.*, 88 N. Y. 481; *Wright v. Southern Pac. Co.*, 14 Utah, 383, 46 Pac. 374.)

It is patent in this case that the defendant was negligent in not providing sufficient men to do the work which the plaintiff was called upon to perform. If this is a fact, risks arising out of the negligence of the master or of one whom the master instructs with the superintendence of the work (foreman in this case) are not risks ordinarily incident to the employment, and are not assumed by the employee. (*Baxter v. Roberts*, 44 Cal. 187, 13 Am. Rep. 160; *Beeson v. Green Mt. G. Min. Co.*, 57 Cal. 20; *Sanborn v. Madera Flume etc. Co.*, 70 Cal. 261, 11 Pac. 710.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Plaintiff brought this action to recover damages for a personal injury suffered by him during the course of his employment as a section-hand. The complaint alleges in substance that while he was in the employ of defendant and under the immediate direction of its foreman, Manuel Pearson, whom he was bound to obey, it became plaintiff's duty to assist in lifting a heavy rail then lying on the ground near the track of defendant; that the rail was thirty feet in length and weighed about 990 pounds; that it was to be lifted from the ground to and upon a hand-car to a height of approximately three feet; that to lift such a rail requires from six to eight able-bodied strong men; that this fact was well known to the defendant and its foreman, or ought to have been known to them, but was not known to plaintiff; that it was defendant's duty, in the exercise of reasonable care, to furnish a sufficient number of men to lift the rail so that plaintiff would not be exposed to danger in the performance of his duty; that defendant failed to perform its duty in this behalf; that knowing that from six to

eight able-bodied strong men were necessary for that purpose, it furnished only two men beside the plaintiff, to do the work; that this number was insufficient; that the plaintiff had never had any experience in lifting rails; that this fact was known to defendant and that, through the negligence of defendant in failing to furnish enough men and while plaintiff was assisting to lift the rail, he suffered the injury complained of. Defendant's general demurrer having been overruled, it answered denying the negligence charged and alleging affirmatively that plaintiff assumed the risk. There was issue by reply. The plaintiff had verdict and judgment. The cause is before this court upon appeals from the judgment and an order denying defendant's motion for a new trial. The principal questions submitted are, whether the complaint discloses upon its face that plaintiff assumed the risk, and whether, if it does, the evidence discloses that he did so.

There is a tunnel on the line of defendant's road to the east of Bozeman, in Gallatin county. In this tunnel and near the portal toward Bozeman a rail in the track had become defective, and it was necessary to replace it with a new one. The plaintiff with two others, a young man of nineteen and an old man of sixty-two years, accompanied by Manuel Pearson, the section foreman, were engaged in doing the work. They had obtained the new rail from rail-posts a short distance to the west and brought it on a hand-car. In loading it on the car they had been assisted by the brother of plaintiff who chanced to be passing. When the new rail had been put in place, it was necessary to remove the defective one in order to clear the track. It was lying near the middle of the track. To load it on the car the foreman, assisted by the plaintiff and one of the remaining two men, lifted one end of it while the fourth man pushed the car under it. A lift of two and a half feet was necessary in order that the car might have room to pass under. As plaintiff lifted, he felt a sharp pain in his side. Later a swelling appeared in his groin which, upon examination, his physician found to be due to a rupture. Plaintiff was twenty-

three years of age. He had been reared up on a farm in Gallatin county and had the experience of the average boy brought up on a farm and inured to such labor as this pursuit requires. He had worked for defendant as a section-hand for three or four months early in 1913. He again entered its service in January, 1914, and continued therein until March 23, 1914, when he was injured. We quote the following excerpts from the testimony of plaintiff which disclose how the work was begun and proceeded until it was completed, and plaintiff's experience in that kind of work:

"Q. Referring to the rail in question, how do you get your information as to the weight and length of this rail?

"A. I inquired of the foreman after the accident.

"Q. Did you know how long this rail was or how much it weighed before the accident occurred?

"A. No, sir, I did not. Two men assisted me in the lifting of the rail,—the foreman and the young Romeo, nineteen years of age, and the old man. The foreman, Mr. Pearson, had charge and directed this work.

"Q. Did you previous to this accident ever have any experience in lifting rails?

"A. No, sir, I did not.

"Q. Did you know that an injury of this kind might result to you as the result of lifting the rail?

"A. No, sir, I did not. * * *

"Q. You knew that was one of the duties of section-hands when you worked there in 1913, to replace defective rails, did you not?

"A. I didn't replace any defective rails when I worked there before—or broken rails. * * *

"Q. Don't you know that it was your duty as part of that section gang to replace that rail if you found one—didn't you know that was your duty?

"A. I didn't know that they would try to put it in with the amount of men we had. * * *

"Q. Where did you get the new rail at the time you put it into the track?

"A. Outside.

"Q. Outside of the tunnel?

"A. Yes, sir.

"Q. How far outside of the tunnel?

"A. About a quarter of a mile or something like that—maybe not that far.

"Q. It was one of the rails that stands upon one of these two rail-posts along the side of the track?

"A. Yes, sir.

"Q. How did you get that rail from the rail-post on the outside of the track, into the tunnel?

"A. We slid it—we had those kind of—

"Q. (Interrupting.) Tongs?

"A. Yes, and kind of zigzagged it back and forth until we got it into the middle of the track and we had a—we had a bar in the middle of the track and it was up on that—I can't say for sure but I am quite certain that we were trying to lift the rail up. My brother was going up to the depot after some cans and I hollered at him and said, 'Hey, kid, come over and give us a lift. Come and help us.'

"Q. Why did you call your brother over there—he wasn't working for the company?

"A. I wanted him to give us some help.

"Q. Why did you want him to give you help?

"A. To make it easy for us.

"Q. As I understand now, you first rolled this rail off these rail-posts and then you had these tongs which are something similar to a pair of ice-tongs which clamped on to the top of the rail and had handles to it to pull on. Then you proceeded to pull the rail across from the rail-posts to the track by pulling one end around and then going to the other end and pulling it around a few feet?

"A. Yes, sir.

“Q. When you got it to the track how did you get it over the rail?

“A. We had a bar from the top of the track and we slid it up on to the track—there was a bar across the two rails so it couldn’t drop clear down.

“Q. That would give you an opportunity to get your two hands under it to lift it up?

“A. Yes, and a much easier lift.

“Q. As a matter of fact—you say you called your brother over—and the four of you lifted it up and the other fellow shoved the car under. Just the same as when you took the rail out?

“A. Yes, sir, but it wasn’t quite so hard a lift—these are old sidetracks and they have no ballast under the rails and the rails are much smaller and in the tunnel it is higher still and we have three inches of shim under the rails—it was nine inches further lift in the tunnel than outside.

“Q. You lifted it the same way—three men lifted up one end and the fourth man shoved the car underneath it?

“A. Practically the same way.

“Q. As I understand you, when you got into the tunnel you skidded the new rail off the hand-car, took out the old rail and lifted that into the center of the track and put the new rail in?

“A. Yes, sir.

“Q. So that the old rail was lying in the center of the track?

“A. Yes, sir.

“Q. You then lifted that rail as you have before stated by three of you lifting it up and the other man shoving the car under it?

“A. Yes, sir.

“Q. In pulling this rail over from the sidetrack or from the rail-posts and lifting it on the car outside there, you learned that it was a pretty heavy rail?

“A. We had lots of time when on the outside we weren’t rushed at all—on the inside we were in a hurry because 170

passenger was coming and we had to hurry; it wasn't half the lift on the outside.

"Q. You didn't discover on the outside that this rail weighed several hundred pounds?

"A. I didn't have any idea of what it weighed.

"Q. You thought it necessary to call your brother over from the road and ask him to help give a lift?

"A. I thought he could—I thought he was going by and he might help us.

"Q. You were the only one who called him over and asked him to help you?

"A. Yes; I asked him if he would. * * *

"Q. I don't know whether I asked you if the rail you took out of there in the tunnel was the same sized rail as the one you put in, was it?

"A. Yes, sir. * * *

"Q. You say that during your experience as a section-hand in 1913 you never saw any rails?

"A. Yes, I saw rails—lots of them. I never saw rails replaced by new rails, not on my section—they never replaced any while I was there. I saw lots of rails along the track, and I saw rails outside of the track. I saw rails along on these section posts. I never had occasion to put one of those rails out on section posts. I don't know what the weight of a hand-car is. I have lifted with a hand-car. It is a duty of a section-hand to lift off a hand-car and lift it on whenever they stop to do any work, but we only have to lift it about an inch and it is off."

The action was brought under the Federal Employers' Liability Act. (Act April 22, 1908, 35 U. S. Stat. 65; Amendment Act, April 5, 1910, 36 U. S. Stat. 291.) There is no controversy that at the time plaintiff was injured he was engaged in interstate commerce. Section 4 of the Act takes away the defense of assumption of risk in any case in which a violation of a federal statute enacted for the safety of employees has contributed to the injury or death of an employee, but leaves it available

in all other cases. (*Seaboard Air Line Ry. v. Horton*, 233 U. S. 492, Ann. Cas. 1915B, 475, L. R. A. 1915C, 1, 58 L. Ed. 1062, 34 Sup. Ct. Rep. 635, 8 N. C. C. A. 834; *Southern R. Co. v. Crockett*, 234 U. S. 725, 58 L. Ed. 1564, 34 Sup. Ct. Rep. 897.) The defense may be interposed as a bar in an action for the [1] personal injury or death of an employee, when such injury or death has been caused by a hazard which is incident to the particular business. When it has resulted from a hazard brought about by a failure of the employer to exercise the degree of care required of him by law to perform his primary duty to provide a reasonably safe place of work and reasonably suitable and safe appliances for the work, the defense is also available, provided the employee is aware of the condition of increased hazard thus brought about, or it is so obvious that an ordinarily prudent person, under the same circumstances, would have observed and appreciated it. The rule thus stated has been recognized and applied by this court in several cases. (*McCabe v. Montana C. R. Co.*, 30 Mont. 323, 76 Pac. 701; *Hardesty v. Largey Lumber Co.*, 34 Mont. 151, 86 Pac. 29; *Coulter v. Union Laundry Co.*, 34 Mont. 590, 87 Pac. 973; *Leary v. Anaconda C. Min. Co.*, 36 Mont. 157, 92 Pac. 477; *Monson v. La France Copper Co.*, 43 Mont. 65, 114 Pac. 778; *Fotheringill v. Washoe C. Co.*, 43 Mont. 485, 117 Pac. 86; *Molt v. Northern Pac. Ry. Co.*, 44 Mont. 471, 120 Pac. 809.) This court has held [2] that the failure of the employer to provide a sufficient number of competent employees to perform the work in hand with reasonable safety to all those engaged in its accomplishment is culpable negligence. (*Verlinda v. Stone & Webster E. Corp.*, 44 Mont. 223, 119 Pac. 573.) In this case it was said: "Again, if he [the superintendent] permitted Turchin [a coemployee of plaintiff] unaided to undertake to lower the chain, knowing that by reason of its weight Turchin could not hold it, he was guilty of negligence which must be imputed to the company; for it is also a duty of the master to provide a sufficient number of servants to perform the work with reasonable safety."

Whether the rule here stated applies to the facts in the instant case, we shall see later.

It is generally held in cases like this that the employee is [3] the best judge of his own muscular capacity, and the risk is upon him not to overtax it. (*Stenvog v. Minnesota Transfer R. Co.*, 108 Minn. 199, 17 Ann. Cas. 240, 25 L. R. A. (n. s.) 362, 121 N. W. 903.) In this case the plaintiff was directed to assist another employee in loading switch-rails into a box-car. After the work had proceeded for thirty minutes, the plaintiff found that it was too heavy for him, and so informed the defendant's foreman. The foreman disregarded the complaint and directed the plaintiff to go on with the work. In lifting a heavier rail plaintiff strained his back. The court held that he was the best judge of his own capacity, and that in proceeding to do the work he assumed the risk of overtaxing it, and could not recover.

In *Worlds v. Georgia R. Co.*, 99 Ga. 283, 25 S. E. 646, the plaintiff, a yard trainman, was directed by his superior—the yardmaster—to carry cross-ties to assist in putting a derailed coal-car on the track. He complained that the ties were too heavy, but was required by the yardmaster to proceed, which he did, and was injured by a strain of his back. The court held that the defendant was not liable because, when an employee of a railroad company is directed to lift and carry any ordinary object like a cross-tie, he is bound to take notice that it is heavy and that a certain amount of physical strength will be required to accomplish his task; and if he misconceives the amount to be exerted and overstrains and injures himself in an effort to accomplish it, he assumes the risk. That he acts under the immediate orders of a superior does not alter the case, though he has reason to believe that disobedience will result in his dismissal. To the same effect is the holding in Missouri (*Haviland v. Kansas City etc. R. Co.*, 172 Mo. 106, 72 S. W. 515), North Carolina (*Bryan v. Southern Ry. Co.*, 128 N. C. 387, 38 S. E. 914), Tennessee (*Ferguson v. Phoenix Cotton Mills*, 106 Tenn. 236, 61 S. W. 53), Texas (*Texas etc. R. Co. v. Miller*, 36 Tex. Civ. App. 240, 81 S. W. 535, *Haywood v. Galveston etc. R.*

Co., 38 Tex. Civ. App. 101, 85 S. W. 433), and Oklahoma (*St. Louis & S. F. R. Co. v. Snowden* (Okl.), 149 Pac. 1083.) The rule is declared in these cases in varying terms, but from them may be deduced the conclusion stated by the annotator of *Stenvog v. Minnesota Transfer R. Co.*, *supra* [17 Am. & Eng. Ann. Cas. 240]: "The lifting of heavy objects involves no perils that are not obvious to any person of common understanding; hence an employee who undertakes to lift or assist in lifting a heavy object assumes the risk of injury due to the task being too great for his strength, and in case injury results, he is not entitled to recover damages from his employer." The rule is thus stated by Mr. White in his work on Personal Injuries on Railroads: "It is quite generally held that when an employee is injured from lifting at a car, or a steel rail, or any similarly heavy substance, where the weight of the object attempted to be lifted is a matter of common knowledge and the number of men that it takes to handle it is well known by the employee, the risk of such an injury is assumed as an incident of the employment." (Sec. 339.)

Cases like the foregoing may be classed as "strain cases," in that the injury complained of is internal, and is the result of overtaxation by the injured employee. Cases frequently arise in which the injury is external—as the crushing of a hand or foot of an employee because his strength, combined with that of his assistants, is not sufficient to safely handle the heavy object. The latter are usually cited as based upon the same principle as the former. Of this class are *Southern Kansas Ry. Co. v. Drake*, 53 Kan. 1, 35 Pac. 825, *White v. Owosso Sugar Co.*, 149 Mich. 473, 112 N. W. 1125, *Fremont Brewing Co. v. Hansen*, 65 Neb. 456, 91 N. W. 279, 93 N. W. 211. All of these cases proceed upon the theory, either that such injuries arise from hazards ordinarily incident to the particular business, or that the hazard is so open and obvious that the injured employee assumes the risk. The case of *Verlinda v. Stone & Webster E. Corp.*, *supra*, is assignable to still a different class, in that the injury there complained of was caused by the inability

of an employee to handle, without assistance, a heavy chain attached to a boom by a hook, and for this reason it got away from him and, falling from the hook, injured another employee who was engaged upon a distinct part of the work. It is not pertinent to this case except in so far as it announces the general rule that it is the duty of the master to provide a sufficient number of servants to perform the work in hand with reasonable safety. In other words, "when the work requires men to do it, the men engaged therein are classed as appliances" (*Haviland v. Kansas City etc. R. Co.*, *supra*), and the general rule as to defects in appliances furnished by the master controls. If we should follow the path of authority as defined in the other cases cited *supra*, we would be compelled to the conclusion that the plaintiff cannot recover in this case, either upon the allegations of his complaint or the evidence adduced in support of them, and this, for the reason that the plaintiff assumed the risk as an incident to the employment and thus absolved the defendant from liability. This general rule has been held not to apply, however, where the servant is a person of immature years and sustains the injury while under the direction of his superior. (*Sherman v. Texas etc. R. Co.*, 99 Tex. 571, 91 S. W. 561.) In this case a young man seventeen years old, a machinist helper in defendant's shops, sustained internal injuries in lifting a heavy piece of iron. He was well grown and had been at work in defendant's employment about three months. During that time he had been called two or three times to assist in lifting and placing heavy pieces of iron upon a lathe. On this occasion he had been called and deputed by the foreman to assist the operative of a lathe to put a heavy piece of iron upon his lathe. He acted as required by the foreman under the direction of the operative, and in lifting one end of the iron overtaxed his strength and was injured. In the trial court plaintiff had judgment. The court of appeals reversed it and ordered judgment for defendant. The supreme court disapproved the judgment of the court of appeals and remanded the case for trial on the merits. On the question of

assumption of risk, the supreme court said: "It cannot be said, as a matter of law, that the minor, George Sherman, could, by inspection of the piece of iron, tell whether it was too heavy for him to lift and that he was capable of understanding the danger attending the lifting of the iron. Indeed, the only way that he could decide the question was to do as he did—obey the command of his superior and make the attempt. But in that experiment, when he learned that the iron was too heavy for him to lift, the injury had been inflicted." In its ultimate analysis this statement, it seems to us, is nothing more than a concrete application of the doctrine of assumption of risk as declared by this court, in *McCabe v. Montana Cent. R. Co.*, *supra*, and the other cases cited, *viz.*, that when the employee knows and appreciates a danger brought about by defective appliances or an unsafe condition of the place of his work, he assumes the risk, but not otherwise. In *Bonn v. Galveston H. & S. A. Ry. Co.* (Tex. Civ.), 82 S. W. 808, the plaintiff was a man fifty-six years of age, an experienced section-hand, though he had not been accustomed to handle rails. He was directed by his foreman to assist in carrying a rail over a ditch. As this was being done, one of the men in the crew slipped, throwing the excessive weight upon the plaintiff, which caused a strain resulting in a rupture. The trial court directed a verdict for the defendant. The court of civil appeals reversed the judgment, holding that the evidence presented a case for the jury. A second trial resulted in a verdict and judgment for the plaintiff. In *Galveston etc. R. Co. v. Bonn*, 44 Tex. Civ. App. 631, 99 S. W. 413, the court refused a writ of error, holding that the evidence was sufficient to sustain the verdict.

In *Illinois Cent. R. Co. v. Langan*, 116 Ky. 318, 76 S. W. 32, the facts were these: The plaintiff was a freight handler. He and three others were directed by the freight clerk to unload steel shafts from a freight-car to the freight platform, the shafts weighing from 200 to 460 pounds. The larger ones were five or six inches in diameter, twenty feet long, were round, and had been oiled or greased. The crew having moved several of

the smaller shafts, requested the clerk to obtain assistance for the moving of the larger ones, stating that they could not move them with safety. The clerk having failed to get additional men, told the crew to go on with the work. While they were attempting to handle one of the larger shafts, it slipped and fell on plaintiff's foot, crushing it. The court held that a verdict for the plaintiff was proper. Though in the case of *Sherman v. Texas etc. R. Co.*, *supra*, the immature years of the plaintiff was, in the estimation of the court apparently a decisive factor, it seems to us that the important consideration is the experience of the employee in the same kind of work, though immaturity of years is a pertinent fact in determining his capacity to judge correctly.

Nor do we think that it is a decisive factor that the employee did the act resulting in his injury in obedience to an express order of the superior given at the time. If the employee is acting in the line of his duty, he is acting in obedience to the orders of his superior, whether the superior is present or absent. It is the right of the master, as well as his duty, to give orders. The duty of the employee is to yield obedience unless it is obvious that obedience will expose him to unusual dangers. If the employee should stop to make tests and conduct experiments to determine for himself whether he can safely obey his orders, it would be impossible to accomplish any kind of enterprise. Therefore the employee has the right to assume that the master has used due diligence to perform all the primary duties incumbent upon him when he assigns a duty to be performed. (*McCabe v. Montana Cent. R. Co.*, *supra*.)

On this subject, in *Chicago & N. W. Ry. Co. v. Bayfield*, 37 Mich. 205, 210, Mr. Justice Cooley said: "It is true that the master had no right to direct him [the servant] to do anything not contemplated in the employment, but when one thus contracts to submit himself to the orders of another, there must be some presumption that the orders he receives are lawful, the giving of the orders being of itself an assumption that they are lawful; and the servant who refused to obey would take upon

himself the burden of showing a lawful reason for the refusal. This of itself is sufficient reason for excusing the servant who declines the responsibility in any case in which doubts can possibly exist; he should assume that the order is given in good faith and in the belief that it is rightful, and if in his own judgment it is unwarranted, it is not for the master to insist that the servant was in the wrong in not refusing obedience."

The case where the employee is at work under the order of his superior, spoken at the time, is not different from that in which he is working in the presence of his superior and under his direction but without spoken order. He is under the same obligation not to stop and question and decide for himself in the one case as in the other, unless, as we have said, the hazard is so obvious that, as a reasonably prudent person, he must have understood and appreciated it. The presence and general direction of his superior implies an order for everything done.

Applying these principles to the present case, we conclude [4, 5] that the complaint states a *prima facie* case, and that the evidence made a case for the jury. It is true that actual ignorance of the particular risk will not relieve the servant; that his ignorance must be excusable; that he is bound to use his senses, and cannot allege ignorance of a hazard which is obvious to anyone of ordinary intelligence and understanding; and that though he does not appreciate the extent of the hazard or does not know precisely the injury he may incur, the risk is his (Bailey on Personal Injuries, 2d ed., sec. 376; *Anderson v. Northern Pac. R. Co.*, 34 Mont. 181, 85 Pac. 884); yet if the hazard requires knowledge or judgment not possessed by men of ordinary observation, the servant does not, as a matter of law, assume the risk (Bailey on Personal Injuries, sec. 376, *supra*). The allegations of the complaint bring the case within the principle of *Coleman v. Perry*, 28 Mont. 1, 72 Pac. 42, *Killeen v. Barnes-King Dev. Co.*, 46 Mont. 212, 127 Pac. 89, rather than within the rule of *Coulter v. Union Laundry Co.*, 34 Mont. 590, 87 Pac. 973, *Fotheringill v. Washoe Copper Co.*, 43 Mont. 485, 117 Pac. 86, and *Molt v. Northern Pac. R. Co.*, 44 Mont. 471, 120

Pac. 809, upon which latter counsel rely, viz., the facts alleged do not as a matter of law disclose that plaintiff assumed the risk.

As we view it, the evidence presented a case calling for the judgment of the jury. Neither the plaintiff nor any other witness stated that the men engaged in the work were not sufficient to safely handle the rails. Counsel took the position at the trial that the evidence offered on this point by plaintiff was incompetent, insisting that the number of men required to lift a heavy object such as a steel rail was a matter of common knowledge. The testimony of the plaintiff discloses the number and the apparent physical condition of the men employed and the character of the work. The jury determined that the number of men was not sufficient, thus convicting the defendant of negligence. Of the result in this behalf counsel do not and cannot justly complain. Assuming, then, that the defendant was at fault, was this fault the proximate cause of plaintiff's injury? The causal relation between the fault and the injury is shown, we think, by the implied direction of the foreman to do the work as it was done. The plaintiff had the right to presume that he might safely act under the direction of the foreman, and the injury presumptively resulted from error in the judgment of the foreman in estimating the capacity of the men, including the plaintiff, rather than from error in the judgment of the plaintiff, inexperienced as he was in doing the particular kind of work. It being the duty of the defendant to provide a suitable number of servants in the first place, it was primarily the judge as to whether it had met this duty, and the implied direction to the plaintiff to proceed was, under the circumstances, the proximate cause of the injury.

It may not be presumed as a matter of law that the plaintiff, [6] though reared on a farm, had gained appreciative knowledge that the weight of the rail was beyond the capacity of the three men, from the fact that four men a short time before had lifted another rail of the same size and weight. The situation was then different. When, therefore, he came to lift the second rail, the burden was not upon him to refuse to proceed with the

smaller number of men, as against the alternative of assuming the risk of such injury as he might suffer. The evidence as a whole made a case from which reasonable men might draw different inferences, and this called for the judgment of the jury. In drawing therefrom an inference favorable to the plaintiff, they were within their legitimate province, and their conclusion we may not overturn.

Counsel contend that the verdict is contrary to instructions 6 and 7, and hence is contrary to law. In these instructions [7] the court properly submitted to the jury the question whether the plaintiff assumed the risk under the circumstances disclosed by the evidence. They insist that inasmuch as it appears that the plaintiff assisted in lifting the first rail and later assisted in lifting the second without objection or protest, it appeared conclusively that he assumed the risk. Upon this evidence, they say, the finding of the jury could not have been in favor of the plaintiff. As already pointed out, the evidence made a case for the jury upon the issue of assumption of risk; and since they were at liberty to find either way, their finding was not contrary to law.

In instruction No. 4 the court told the jury that it is the [8] duty of the master to exercise ordinary care to assign an adequate number of servants to each particular piece of work, that the work may be done with safety to themselves. Counsel contend that this cast too great a burden upon the defendant. As we understand the rule defining the primary duties of the master as to safe appliances, *etc.*, it requires him not only to provide them in the first place, but to maintain them during the progress of the work, and each particular part of it. (3 Labatt on Master & Servant, sec. 1107.) The obligation is not relaxed at any time; nor is the master excusable for any negligence in this behalf, except by the servant himself who knowingly assumes the increased risk.

The judgment and order are affirmed.

Affirmed.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

DIER, APPELLANT, v. MUELLER, RESPONDENT.

(No. 3,729.)

(Submitted January 26, 1917. Decided February 19, 1917.)

[163 Pac. 466.]

***Personal Injuries—Landlord and Tenant—Failure to Repair—
Liability of Landlord—Statutes.***

1. Sections 5226 and 5227, Revised Codes, providing that a lessor of a building intended for human occupation must put it in condition therefor, and repair subsequent dilapidations, and if, after reasonable notice, he neglects to do so, the lessee may repair and deduct the expenses from rent, or vacate without liability for rent, gives no right of action for personal injuries to a tenant caused by failure to repair.

[As to liability of landlord for injuries resulting from the condition of the premises after execution of the lease, see note in 17 Am. Rep. 127.]

Authorities passing on the question of liability of landlord for injury to tenant from defects in premises are collected in notes in 34 L. R. A. 824; 11 L. R. A. (n. s.) 504; 34 L. R. A. (n. s.) 798; 48 L. R. A. (n. s.) 917.

Appeal from District Court, Silver Bow County; J. B. McClernan, Judge.

ACTION by Antonia Dier against W. H. Mueller. Judgment for defendant and plaintiff appeals. Affirmed.

Messrs. William and Harry Meyer, for Appellant, submitted a brief; the former argued the cause orally.

Upon this appeal there is but one question involved, namely: What is the liability of a landlord to a tenant, or a member of the family of a tenant, where said tenant, or a member of his family, is injured as a result of the defective condition of the premises leased? The better reasoned cases, and the ones more in accord with law and justice, hold that in an action such as this, the landlord is liable for the amount of damages actually sustained by the tenant or family of tenant, irrespective of what the costs of repairs would be or the rental value of the premises. Those states which hold that the latter is not the true rule of

law proceed upon the theory that damages for injuries are too speculative and remote to have been within the contemplation of the parties at the time the contract of hiring was made; therefore the tenant should not be permitted to recover such damages where injuries are sustained by reason of a defect in the condition of the premises. We believe the better rule to be as stated above. (See *Lowe v. O'Brien*, 77 Wash. 677, 138 Pac. 295; *Mesher v. Osborne*, 75 Wash. 439, 48 L. R. A. (n. s.) 917, 134 Pac. 1092; *Barron v. Liedloff*, 95 Minn. 474, 104 N. W. 289; *Stillwell's Admr. v. South Louisville Land Co.*, 22 Ky. Law Rep. 785, 52 L. R. A. 325, 58 S. W. 696; *Graff v. Wm. J. Lemp Brewing Co.*, 145 Mo. App. 364, 129 S. W. 1005; *Nutter v. Colyer*, 180 Mich. 107, 146 N. W. 643; *Glynn v. Lyceum Theater Co.*, 87 Conn. 237, 87 Atl. 796.)

Messrs. Walker & Walker, for Respondent, submitted a brief; *Mr. Thomas J. Walker* argued the cause orally.

Under sections 5226 and 5227, Revised Codes, in a case such as the one at bar, no action for damages because of the defective condition of the premises can be maintained, but tenants must advantage themselves of the rights and remedies set forth in such statutes. While this court does not seem to have construed the liability of landlords in cases of this character, the California courts have on numerous occasions decided that the duties and obligations of a landlord are limited by the extent of the privilege conferred upon the tenant, *i. e.*, it is the duty of the landlord to repair upon notice, and if he does not perform this duty, he is to be compelled to pay by deducting from the rent to the extent of a month's rental or at the option of the tenant the term to be concluded without redress to the landlord. (*Van Every v. Ogg*, 59 Cal. 563; *Sieber v. Blanc*, 76 Cal. 173, 18 Pac. 260; *Willson v. Treadwell*, 81 Cal. 58, 22 Pac. 304; *Tatum v. Thompson*, 86 Cal. 203, 24 Pac. 1009; *Green v. Redding*, 92 Cal. 548, 28 Pac. 599; *Daley v. Quick*, 99 Cal. 179, 33 Pac. 859.) A note somewhat in point on this question and which is favorable

to the contention of the defendant can be found in Ann. Cas. 1912B, page 353. We further call the court's attention to the principle that contributory negligence defeats recovery when apparent on the face of the complaint. (*Kampinsky v. Hallo*, 3 Misc. Rep. 623, 23 N. Y. Supp. 114, and note, Ann. Cas. 1913C, p. 975.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This is an appeal from a final judgment in favor of defendant rendered after an order sustaining his demurrer to plaintiff's complaint. The averments of the complaint may be epitomized as follows:

The plaintiff and her husband were tenants of the defendant, occupying the property at No. 623 South Idaho Street, in Butte. These premises consist of a one-story brick dwelling-house of four rooms with a porch, and the lot upon which it is situated. The porch is about two feet above the ground, and was used by the plaintiff and other members of the family as occasion or necessity required. The tenancy was from month to month. During its continuance the porch fell into disrepair, in that one of the boards in the floor became weak and insufficient in strength to hold the weight of a person who chanced to step on it. The defendant was notified of the condition and promised to cause the necessary repairs to be made more than a month prior to plaintiff's injury. Notwithstanding his promise, defendant failed and neglected to cause the repairs to be made. On July 22, 1914, the plaintiff stepped on the defective board which, because of its weakened condition, gave way under her weight, whereby she was thrown to the floor, sustaining a fracture of her right leg and other injuries which she believes to be permanent. She seeks to recover \$5,000 as general damages, and \$300 for expense incurred for medical treatment.

The demurrer presents the single question whether the complaint states a cause of action. The solution of this inquiry depends upon the proper interpretation of sections 5226

and 5227 of the Revised Codes. In *Van Every v. Ogg*, 59 Cal. 563, the supreme court had occasion to determine the purpose and scope of sections 1941 and 1942 of the Civil Code of California, which are identical with our own *supra*. In that case the contention was made that section 1941 (Rev. Codes, sec. 5226) by operation of law inserts in every lease a covenant to repair. In disposing of the contention the court said: "But bearing in mind that at the common law no such covenant was implied, and reading the two sections together, the intent seems clear that the obligation of the landlord should be limited by the extent of the privilege conferred upon the tenant: that it is the duty of the landlord to repair upon notice, and if he does not perform his duty he is to be compelled to pay, by deduction from the rent, to the extent of a month's rental—or, at the option of the tenant, the term be concluded without redress to the landlord." Following this decision down to the date the provisions were incorporated in our own Codes, the California court consistently adhered to this construction of them. In *Bush v. Baker*, 51 Mont. 326, 152 Pac. 750, referring to these provisions, this court said: "These sections, as we are told in the report of the Code Commission, were taken from California, and investigation discloses that they came to us with a construction upon them which leaves no room for doubt. (*Van Every v. Ogg*, 59 Cal. 563; *Sieber v. Blanc*, 76 Cal. 173, 18 Pac. 260; *Callahan v. Loughran*, 102 Cal. 476, 36 Pac. 835.) This construction is to the effect that, if the landlord fails to repair after notice, the tenant may himself repair, within a certain limit, or move out; but he has no redress in damages for injury to person or property consequent upon the landlord's failure to repair. Whether this construction be right or not, it was presumably adopted with the sections themselves, it constitutes a rule of property, and the courts of this state are without authority to alter it." This decision is determinative of this case.

The judgment is affirmed.

Affirmed.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

STATE, RESPONDENT, v. REED, APPELLANT.

(No. 3,826.)

(Submitted January 24, 1917. Decided February 19, 1917.)

[163 Pac. 477.]

Criminal Law—Females—Transportation for Immoral Purposes—Jurisdiction—Donlan “White Slave” Act—Information—Counts—Constitutional Guaranties—Searches and Seizures—Instructions—Hearsay Evidence—Opinions—Expert Testimony—Inadmissibility.

Criminal Law—Donlan “White Slave” Act—Females—“Immoral Purposes.”

1. Defendants attempted to entice a seventeen-year old girl to accept a position in a hotel in a neighboring state, informing her that the place was a sporting-house, and that her duties would be to dance, play cards, drink beer and entertain men. The evidence tended to show that the place was not one where a girl could stay for any length of time and be respectable. *Held* that the purposes of the employment were “immoral” within the meaning of section 2 of the Donlan Act (Laws 1911, Chap. 1).

Same—Attempt—When Complete—Jurisdiction.

2. An attempt to induce a female to take up her residence in another state for immoral purposes which was complete before transportation had commenced, was punishable under the Donlan, and not under the Mann, Act.

Same—Information—Counts—Evidence—Appeal and Error.

3. Where defendant in a criminal prosecution made no attempt during the trial to have three of four counts of the information withdrawn from the consideration of the jury because unsupported by the evidence, he was not in a position on appeal to raise the question whether a general verdict of guilty can stand where only one of a number of counts has support in the evidence.

Same—Evidence—Searches and Seizures—Constitutional Guaranties.

4. The admission in evidence, without defendant's consent, of a letter taken from his private papers, access to which was obtained by keys obtained from his person by officers, did not deprive defendant of his constitutional rights to be secure from unreasonable searches and seizure, and to not be compelled to testify against himself.

Same—Information—Amendment—Harmless Error.

5. Alleged error in permitting the state to amend the information, at the close of all the testimony, by inserting the real name of the prosecutrix for that of “Jennie Doe,” was harmless.

Same—Instructions—“Immoral Purposes”—Reversible Error.

6. An instruction defining “immoral purpose” as used in section 2 of the Donlan Act, *supra*, as “one which is violative of conscience or moral law inconsistent with purity, rectitude or good morals, or hostile to the welfare of the general public,” *held* prejudicially erroneous.

Same—Letters—Hearsay Evidence.

7. Letters describing and characterizing the place to which a girl was sought to be transported for immoral purposes were inadmissible as hearsay.

Same—Opinion Evidence—When Improper.

8. The character of a place to which a girl was attempted to be transported for immoral purposes was not susceptible of proof by expert testimony in the form of opinions.

[As to whether expert witness may give opinion as to ultimate fact, see note in *Ann. Cas.* 1914B, 191.]

Appeal from District Court, Silver Bow County; Michael Donlan, Judge.

J. E. REED was found guilty of a violation of the Donlan Act (Laws 1911, Chap. 1). From the judgment of conviction and from an order denying him a new trial, he appeals. Reversed and remanded.

Mr. Harry Meyer, for Appellant, submitted a brief and argued the cause orally.

Mr. J. B. Poindexter, Attorney General, and Mr. C. S. Wagner, Assistant Attorney General, for Respondent, submitted a brief; Mr. Woody, Assistant Attorney General, argued the cause orally.

The defendant was convicted of an attempt. Ordinarily interstate commerce begins when the subject thereof is on board the train destined for interstate traffic. (*State v. Missouri Pac. R. Co.*, 81 Neb. 15, 115 N. W. 614; *Reid v. Southern R. Co.*, 153 N. C. 490, 69 S. E. 618; *In re Greene*, 52 Fed. 104; *United States v. Boyer*, 85 Fed. 425; *The Daniel Ball*, 77 U. S. (10 Wall.) 557, 19 L. Ed. 999; *Bennett v. American Express Co.*, 83 Me. 236, 23 Am. St. Rep. 774, 13 L. R. A. 33, 22 Atl. 159.) It is for acts committed by the defendant prior to the boarding of the train by the prosecuting witness that the defendant was evidently convicted. No case directly in point has been found showing that state courts entertain jurisdiction in such cases, but the following are cited as showing the construction placed upon the Mann Act by the federal courts: *Bennett v. United States*, 194 Fed. 630, 114 C. C. A. 402; *United States v. Flaspoller*, 205 Fed. 1006;

Hoke v. United States, 227 U. S. 308, Ann. Cas. 1913E, 905, 43 L. R. A. (n. s.) 906, 57 L. Ed. 523, 33 Sup. Ct. Rep. 281; *Athanasaw v. United States*, 227 U. S. 326, 327, Ann. Cas. 1913E, 911, 57 L. Ed. 528, 33 Sup. Ct. Rep. 285; *Wilson v. United States*, 232 U. S. 563, 58 L. Ed. 728, 34 Sup. Ct. Rep. 347.

MR. JUSTICE SANNER delivered the opinion of the court.

By a general verdict of guilty J. E. Reed was convicted of a violation of what is known as the Donlan Act (Sess. Laws 1911, Chap. 1), and from the judgment entered on the verdict, as well as from an order denying him a new trial, he appeals.

The information is in four counts; but the state concedes that under the evidence the conviction can stand, if at all, only upon the first count, which charges that the appellant "did willfully, unlawfully, and feloniously attempt to induce, entice, procure and compel Jennie Doe, a female person, to reside with Joseph Kandelhofer for immoral purposes," contrary to section 2 of said Act.

The facts, as presented on behalf of the prosecution by evidence to which no serious exception is taken, are substantially these: Diamondville, Wyoming, is a mining camp consisting largely of Italians and Austrians, and there one Joseph Kandelhofer maintains a "boarding-house"; this place has two stories, and on the ground floor are a barroom, leading off from which is a hallway with doors on each side, and farther on a dining-room; the doors leading off from the hallway give entrance to a winerom and to bedrooms; the winerom is a dance-hall, and the bedrooms are occupied by miners who lodge at the place; girls and young women were employed there, whose principal duties were to dance with men in the winerom, drink with men at the bar, and otherwise, "entertain" the men who frequented the place, during all hours from 7 P. M. to 8 A. M. On or about February 17, 1915, the appellant, who was conducting an employment agency at Butte, was applied to by Dorothy Burger, a girl seventeen years old, for a position; he said he could furnish her a position as waitress in a hotel kept by Joseph Kandel-

hofer at Diamondville, Wyoming, the wages to be \$30 per month, with room and board. She accepted, and he promised to have transportation for her the next day. On the next day he said he had her ticket, that the place was a sporting-house, and that her duties would be to dance, play cards, drink beer, and entertain men; she then consulted a woman friend, who in turn reported to the chief of police, and he, after satisfying himself as to the character of the place, planned that she should take the ticket and board the train en route for Diamondville, but be taken off at Silver Bow; she again sought the appellant, who gave her a letter addressed to Joseph Kandelhofer at Diamondville, Wyoming, and escorted her to the station, where he got and gave her the ticket, and she went upon the train; she was met at Silver Bow by officers, left the train, and returned to Butte. The letter just referred to was one of introduction, and also a notification to Kandelhofer that another girl "of good appearance," named Bessie Krambeal, would come on receipt of transportation; this girl, engaged by the appellant to go to the same house, had been told by him that among her duties she would have to dance and entertain men; that the place was "a kind of a boarding-house with a bar in it and a dance-hall," and she had been given to understand that it was "not a very moral place"; her arrest on the following day prevented her from going. Other evidence, to which exception is taken, tends to show that the place was not one where a girl could live for any length of time and be respectable; that it was, after the events here involved, closed as a public nuisance; and that the appellant knew that girls who were "good-lookers" rather than efficient cooks and waitresses were the chief desideratum there.

1. The first contention is that no case was made for judicial [1] cognizance because the purposes for which Dorothy Burger was to go to Diamondville were not immoral purposes within the meaning of the Donlan Act. In *State v. Harper*, 48 Mont. 456, Ann. Cas. 1915D, 1017, 51 L. R. A. (n. s.) 157, 138 Pac. 495, we took occasion to show the similarity of object of both the Donlan Act, as operative within this state, and the Mann Act of the

national Congress, as operative in interstate commerce—such object being to suppress the traffic in women and girls for immoral purposes. In the Mann Act the thing forbidden is the interstate transportation of women “for prostitution or debauchery, or any other immoral purpose,” while the Donlan Act is directed to every form of traffic in women “for prostitution or concubinage, or any other immoral purpose”; and we think it manifest that the meaning of the phrase “or any other immoral purpose” is the same in each Act. Appellant insists that the rule *ejusdem generis* must be applied and the reference taken to mean immoral acts of like character. We think the rule *ejusdem generis* does apply, but its correct application cannot absolve appellant upon the circumstances here presented. In *Athanasaw v. United States*, 227 U. S. 326, Ann. Cas. 1913E, 911, 57 L. Ed. 528, 33 Sup. Ct. Rep. 285, the national supreme court applied the Mann Act to a state of facts which, so far as undisputed, was not materially different from that at bar, and said: “The instructions of the court were justified by the statute. It is true that the court did not give to the word ‘debauchery’ or to the purpose of the statute the limited definition and extent contended for by defendants, nor did the court make the guilt of the defendants to depend upon having the intent themselves to debauch the girl or to intend that some one else should do so. In the view of the court that statute had a more comprehensive prohibition and was designed to reach acts which might ultimately lead to that phase of debauchery which consisted in ‘sexual actions.’ * * *

The court put it to the jury to consider whether the employment to which the defendants called the girl and the influences with which they surrounded her tended ‘to induce her to give herself up to a condition of debauchery which eventually and naturally would lead to a course of immorality sexually.’ * * *

The plan and place justified the instructions. * * *

The employment to which she was enticed was an efficient school of debauchery of the special immorality which defendants contend the statute was designed to cover.” This authoritative interpretation of the phrase “or any other immoral purpose,” as

used in the Mann Act, is equally apt as an interpretation of the like phrase as it appears in the Donlan Act. We adopt it, and say that the employment to which the appellant tried to entice Dorothy Burger was an efficient school for that special immorality, to-wit: Prostitution or concubinage, which the Donlan Act was clearly designed to cover.

2. It is next contended that the court below had no jurisdiction, because the transaction, if culpable at all, was within the Mann Act. As stated above, the conviction was for an attempt, under section 2 of the Donlan Act, to induce or entice the girl in question to reside with Joseph Kandelhofer for immoral purposes. This offense, complete before the ticket was furnished or transportation commenced, was wholly intrastate and without the purview of the Mann Act or any other national legislation. It is quite true that to furnish a ticket or cause interstate transportation for immoral purposes to commence, subjects the offender to prosecution under the Mann Act. But it is doubtful if the plan of the appellant, frustrated by the girl and the police, could be so prosecuted; in any event, it could not prevent the state from punishing an infraction of its own laws, complete without regard to such transportation, and performed wholly within its own boundaries.

3. The appellant vigorously insists that the conviction cannot stand because the information was in four counts, three of which were unsupported by the evidence and, as the verdict was general, it cannot be told whether the conviction was for the offense as specified in the count supported by the evidence, or for the offense as specified in one of the counts not so supported. To sustain his contention he invokes the statement of this court in *Martin v. Northern Pac. R. Co.*, 51 Mont. 31, 38, 149 Pac. 89, 91, as follows: "There is nothing in the general verdict itself, or in the entire record before us, from which it can be determined upon which of the three counts submitted the jury made their finding. We are unable to agree with counsel for respondent that the authorities cited by him sustain the proposition that, if the complaint contains one good count, the presump-

tion will be indulged that the jurors determined that fact and founded their verdict upon it, rather than upon the counts which fail to state facts sufficient to warrant recovery. Jurors are not familiar with the rules governing practice and procedure, but have a right to assume that any count submitted to them by the court will justify recovery if the evidence supports it." Very clearly the question thus discussed is not the question sought to be raised here. The question sought to be raised here is: Can a general verdict of guilty stand where the information shows four counts, all good as a matter of pleading, but only one of which is supported by the evidence? And that question the appellant is in no position to raise, because he did not seek in any way upon the trial to have the unsupported counts withdrawn from the consideration of the jury.

4. Upon his arrest the appellant was searched, and among the [4] things taken from his person were certain keys. With these keys the officers obtained access to his private papers and secured certain letters, among them the copy of one dated January 6, 1915, addressed to Isa Goldstein, at Helena, which discussed the traffic in girls for Kandelhofer's place; this letter the state offered, and the court over objection received in evidence. The principal ground of objection was, and it is here urged, that as the letter was taken without appellant's consent, it could not be used against him, under his constitutional right to be secure from unreasonable searches and seizures and to not be compelled to testify against himself. There was no merit in the objection. (*State v. Fuller*, 34 Mont. 12, 9 Ann. Cas. 648, 8 L. R. A. (n. s.) 762, 85 Pac. 369; *Adams v. New York*, 192 U. S. 585, 48 L. Ed. 575, 24 Sup. Ct. Rep. 372; *Smith v. State*, 144 Ga. 679, 87 S. E. 893; *Id.*, 17 Ga. App. 693, 88 S. E. 42; note, L. R. A. 1916E, 715.)

5. It is assigned for error that at the close of all the testimony [5] the court permitted the information to be amended by inserting the name "Dorothy Burger" in lieu of "Jennie Doe." The record shows affirmatively that the appellant, as well as the county attorney, knew from the time the information was filed

that "Jennie Doe" was a fictitious name intended to describe the witness Dorothy Burger, and the case was tried throughout on that basis. The information was subject to the amendment (Rev. Codes, sec. 9174), and the conviction could have stood unaffected by the misnomer, had the amendment not been made (Rev. Codes, sec. 9157). The appellant was therefore not prejudiced by the ruling.

6. Over the appellant's objection the court gave instruction X, [6] as follows: "You are instructed that the word 'immoral' is defined to be anything inconsistent with rectitude, purity or good morals, or anything contrary to the conscience or the moral law, or anything hostile to the welfare of the general public; and the word 'purpose' is the object, effect or result aimed at, intended or attained. Therefore an immoral purpose is one which is violative of conscience or moral law, inconsistent with purity, rectitude or good morals, or hostile to the welfare of the general public." As an abstract definition of immorality in the largest sense no exception could, perhaps, be taken to this instruction; but it should be clear from what is said above that as an interpretation of the phrase "immoral purposes," as used in the Donlan Act, it was a palpable and prejudicial misdirection of the jury.

7. The remaining assignments relate to matters of evidence. Some of these are entirely without merit, and others do not suggest that the appellant could have suffered any prejudice; but this cannot be said of all of them. The court, for instance, permitted to be introduced a letter from one Bertolino, post-[7] master of Diamondville, to Jerry Murphy, chief of police at Butte, describing and characterizing Kandelhofer's place, together with certain newspaper clippings—damaging by reason of their contents and their mode of expression, and also received, over objection, a telegram from one Vicars, chief of police at Diamondville, to Mr. Murphy, to this effect: "Four girls deported from Kandelhofer house last week. My advice not to send girls." These were all clearly hearsay, and were not, as the court seems to have thought, made admissible by anything

which occurred in Murphy's cross-examination. Rulings were [8] also made permitting witnesses to express opinions of the Kandelhofer place, obviously wrong, since this was not a matter of expert testimony, but rather for inference by the jury from the facts laid before them, touching the arrangement of the place and the things which commonly occurred there. We do not deem it necessary to discuss these assignments any further, for it is highly improbable that the questions raised by them will recur.

The judgment and order appealed from are reversed, and the cause is remanded for retrial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

STATE EX REL. FORD, RELATOR, v. CUTTS, RESPONDENT.

(No. 3,998.)

(Submitted February 20, 1917. Decided February 21, 1917.)

[163 Pac. 470.]

Quo Warranto—State Legislature—Right to Seat—Supreme Court—Jurisdiction—Moot Questions.

Quo Warranto—Legislature—Right to Seat—Supreme Court—Jurisdiction.

1. Since each house of the legislative assembly is, under section 9, Article V, of the state Constitution, the judge of the ultimate right of persons to seats as members thereof, the supreme court is without jurisdiction to entertain a proceeding in *quo warranto* to determine such right.

Courts—Moot Questions.

2. Courts will not determine abstract questions of law.

Original *quo warranto* proceeding by the State, on relation of S. C. Ford, Attorney General, against William Cutts. Application denied.

Mr. S. C. Ford, Attorney General, for Relator.

Opinion: PER CURIAM.

Application under section 6951, Revised Codes, by S. C. Ford, attorney general, for an order directed to William Cutts, requiring the latter to show cause why the attorney general should not have leave to file a complaint in the nature of *quo warranto* to try the right of William Cutts to act as a member of the House of Representatives, Fifteenth Session. The petition shows that upon the death of Jerry J. Flanigan, a duly elected member of said House of Representatives for the county of Silver Bow, the governor of this state issued to Mr. Cutts a commission as such member to fill the vacancy thus caused; that such commission was presented to the House of Representatives and referred to its committee on privileges and elections; that pursuant to the report of said committee Mr. Cutts was seated by the house as such member, has since acted, and will, unless ousted, continue to act as such.

We cannot and should not take jurisdiction of this proceeding [1] because it must end in nothing. Each house is the judge of the ultimate right of persons claiming seats as members thereof (Const., Art. V, sec. 9; *State ex rel. Thompson v. Kenney*, 9 Mont. 223, 232, 23 Pac. 733), and its decision, right or wrong, is conclusive upon us (*State ex rel. Smith v. District Court*, 50 Mont. 134, 138, 145 Pac. 721; Cooley's Constitutional Limitations, 7th ed., p. 189, and cases cited, note 1). Being powerless to enforce any judgment of ouster against a person recognized by either house as a member thereof, the utmost we [2] could do would be to decide an abstract question of law; the courts of this state are not instituted for that purpose.

The application is denied.

SCHEFFER, RESPONDENT, v. CHICAGO, MILWAUKEE &
PUGET SOUND RY. CO., APPELLANT.

(No. 3,733.)

(Submitted January 27, 1917. Decided February 23, 1917.)

[163 Pac. 565.]

*Railroads—Killing Livestock—Fences—Complaint—Estoppel—
Statutory Construction.*

Statutory Construction—Rule.

1. In construing a statute, the words employed must be given their ordinary meaning, unless it is made apparent from their character, or the context or subject, that a different one was intended.

[As to rules for the construction of statutes, see note in 12 Am. St. Rep. 826.]

Same.

2. Where the language of a statute is plain, simple, direct and unambiguous, construction by the courts is not called for—it construes itself.

Railroads—Livestock—Fences—Gates—Duty to Keep Closed.

3. Where for the convenience of a ranch owner a railroad company constructed a private crossing and a gate in its right of way fence, the company was, under section 4308, Revised Codes, in duty bound to see that it was not left open by persons passing through it; failure in this respect constituting negligence *per se*.

Same—Killing Livestock—Complaint.

4. In an action against a railroad company for damages sustained by plaintiff in killed and injured cattle because of the company's negligence in failing in its duty above adverted to, plaintiff need not allege or prove that defendant knew or should have known that the gate had been left open.

Same—Estoppel—When not Available.

5. Defendant company not appearing to have been misled to its prejudice by anything said or done by plaintiff, the claim that he was estopped by his conduct to claim damages was without merit.

Appeal from District Court, Missoula County; John E. Patterson, Judge.

ACTION by Peter Scheffer against the Chicago, Milwaukee & Puget Sound Railway Company. From a judgment for plaintiff and an order denying it a new trial, defendant appeals. Affirmed.

Cause submitted on briefs of counsel.

Mr. Henry C. Stiff, for Appellant.

Mr. A. J. Violette, for Respondent.

Counsel for appellant states in his brief, "the gates of course constitute a part of such fences," which counsel for respondent admits. (*Mackie v. Central Railroad of Iowa*, 54 Iowa, 540, 6 N. W. 723.) But if a gate is part of a fence, an open gate, so long as it remains open, is not a good and legal fence, nor the proper maintenance thereof as required by our statute. Upholding respondent's contention that the railway company is required to keep such gates closed, we cite the following cases: *Wabash Ry. Co. v. Williamson*, 104 Ind. 154, 3 N. E. 814; *Manwell v. Burlington C. R. & N. Ry. Co.*, 89 Iowa, 708, 57 N. W. 441; *Duncan v. St. Louis, I. M. & S. Ry. Co.*, 91 Mo. 67, 3 S. W. 835; *Galveston, H. & S. A. Ry. Co. v. Wessendorf* (Tex. Civ.), 39 S. W. 132.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The defendant company's railroad runs west from Huson, Montana, and immediately north of the residence of Dolphis Tetreault. The railroad right of way was fenced on both sides, thereby cutting off access from Tetreault's residence to the public road. To accommodate Tetreault the railway company constructed a private grade crossing and a gate in its right of way fence on either side. One of these gates was left open by some unknown person and plaintiff's cattle wandered through on to the railroad track, and some were killed and others injured. Plaintiff recovered a judgment in the lower court and the railway company appeals therefrom and from an order denying its motion for a new trial.

1. The principal question presented is: May plaintiff maintain his judgment upon the facts stated? Or, stated differently, is it necessary for plaintiff to allege and prove that the railway company knew the gate was open or that it was open for such a length of time that notice may be imputed to it?

In 1891 the legislature enacted a statute which required every railway company operating in this state to fence its tracks

against domestic animals (Laws 1891, p. 267), or respond in damages for any such animals killed or injured by reason of the want of such fence. In *Beckstead v. Montana Union R. Co.*, 19 Mont. 147, 47 Pac. 795, it was said that this statute was substantially the same as one in Iowa, and under the Iowa statute it had been held that after complying with its terms in the first instance, the railroad company could be held only to the exercise of reasonable care to keep the fencing in repair and gates and bars closed. (*Henderson v. Chicago, R. I. & P. R. Co.*, 43 Iowa, 620.)

In 1895 the Codes were adopted. Section 950, Civil Code, required every railroad corporation operating in this state to make and maintain a good and sufficient fence on both sides of its tracks, and in case any such corporation did not do so, it should be liable to the owner for any domestic animal killed or injured by its trains unless the accident occurred through the fault or neglect of the owner of the animal. At the same time section 951 was enacted, as follows: "Every railroad corporation or company operating any railroad, or branch thereof, within the limits of this state, which shall negligently injure or kill any horse, mare, gelding, filly, jack, jenny or mule, or any cow, heifer, bull, ox, steer, or calf, or any other domestic animal, by running any engine or engines, car or cars, over or against any such animal, shall be liable to the owner of such animal for the damages sustained by such owner by reason thereof. The killing or injury shall be *prima facie* evidence of negligence on the part of such corporation or company." This section declares the rule of reasonable care and renders a railroad corporation liable for negligence in killing or injuring domestic animals without reference to the place where the accident occurs. If it was intended to require proof of negligence in an action brought under section 950, that section is meaningless, for the next section covers the subject more fully. If it was intended to make a failure to build and maintain a good and sufficient fence *prima facie* evidence of negligence only, the lawmakers

chose very inapt language to express their meaning. They experienced no difficulty in expressing the idea in section 951.

In construing a statute we are required to give to the words [1] employed their ordinary meaning, unless it is made apparent from their character or the context or subject that a different meaning was intended. (*State ex rel. Anaconda C. M. Co. v. District Court*, 26 Mont. 396, 68 Pac. 570, *State ex rel. Gillett v. Cronin*, 41 Mont. 293, 109 Pac. 144.) If the language is plain, simple, direct and unambiguous, it does not call for construction by the courts. It construes itself. (*Osterholm v. Boston & Mont. C. C. & S. Min. Co.*, 40 Mont. 508, 107 Pac. 499.) Applying these rules in the light of the [3] provisions of section 951, and it is apparent that it was the intention of the legislature in enacting section 950 to change the rule of liability theretofore recognized and applied, and to require a railroad company at its peril to make and maintain a good and sufficient fence on both sides of its tracks or respond in damages for domestic animals killed or injured by reason of its failure to do so, unless the owner of the animals is at fault. The statute is not satisfied by the construction of a fence sufficient to meet its requirements. The continuing obligation is imposed to maintain such fence in a condition to effectuate the purpose intended. With certain amendments not involved here, sections 950 and 951 were brought forward into the Codes of 1907 as sections 4308 and 4309, respectively, and state the law upon the subject to-day.

The gate in question was a part of the right of way fence. The statute imposed upon the railway company the duty to see that it was kept closed (*Wabash Ry. Co. v. Williamson*, 104 Ind. 154, 3 N. E. 814), and the failure to keep it closed was negligence *per se*.

It was not necessary to allege or prove that the company. [4] knew or in the exercise of reasonable care should have known that the gate was left open. If the rule is a harsh one, relief from its operation must be sought in the legislature. We

have given to the language of section 4308 (950, Civil Code) the only meaning of which it is apparently susceptible.

It is not necessary to determine whether plaintiff must negative fault on his part or whether the negligence of the plaintiff is an affirmative defense, for in this instance the plaintiff assumed and maintained the burden in his pleading and proof.

2. Some contention is made that the plaintiff is estopped [5] by his conduct to claim damages in this instance; but there is not anything in this record to indicate that the railway company was misled to its prejudice by anything said or done by the plaintiff. (*Yellowstone County v. First Trust & Savings Bank*, 46 Mont. 439, 128 Pac. 596.)

3. We have examined the specifications of error predicated upon the admission and rejection of evidence and upon the giving of certain instructions, but fail to discover prejudicial error.

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

STEVENS, APPELLANT, v. HENNINGSEN PRODUCE CO.,
RESPONDENT.

(No. 3,730.)

(Submitted January 26, 1917. Decided February 24, 1917.)

[163 Pac. 470.]

*Personal Injuries—Master and Servant—Assumption of Risk—
Burden of Proof.*

Personal Injuries—Master and Servant—Assumption of Risk—Burden of Proof.

1. Where plaintiff's own evidence in a personal injury action furnishes the basis for no other inference than that he assumed the risk, he cannot recover unless he exculpates himself, and this whether the defense is pleaded or not.

[As to risks assumed by servant, see note in 52 Am. Rep. 737.]

Same—Assumption of Risk—Case at Bar.

2. Plaintiff was ordered by his employer into the basement of defendant's warehouse to remove a piece of timber which prevented a freight elevator from running at a time when a fire was discovered in the building. When the order was made, neither plaintiff nor defendant knew the nature of the obstruction, and plaintiff, being thoroughly familiar with the mechanism of the elevator, was left the exclusive judge of the course he should pursue. He placed his foot in a position in which he knew it might be, as it subsequently was, injured by the descending counterweights. *Held* that he assumed the risk.

Same—Emergency Rule—Inapplicability.

3. Plaintiff, who acted deliberately and without the impulse of momentary excitement when he was injured (see paragraph 2, *supra*), was not excusable under the rule that where an employee receives injury while rescuing his employer's property, he will not be held guilty of contributory negligence.

'Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.

ACTION by Robert W. Stevens against the Henningsen Produce Company. Judgment for defendant, and plaintiff appeals from it and an order denying his motion for a new trial. Affirmed.

Mr. William Meyer, for Appellant, submitted a brief and argued the cause orally.

The court's action in sustaining the objection to the question whether it was customary to move the elevator at any time without a signal was error. (*Crooker v. Pacific Lounge etc. Co.*, 34 Wash. 191, 75 Pac. 632; *Leque v. Madison Gas etc. Co.*, 133 Wis. 547, 113 N. W. 946; *Leary v. Anaconda Copper Min. Co.*, 36 Mont. 157, 92 Pac. 477.)

It was proper for plaintiff to show that he would not have gone into the place where he was injured if he had not been ordered so to do by his superior officer. (4 Thompson on Negligence, secs. 4630, 4631; White's Supplement to Thompson on Negligence, sec. 4630; *Dallemand v. Saalfeldt*, 175 Ill. 310, 67 Am. St. Rep. 214, 48 L. R. A. 753, 51 N. E. 645; *Allen v. Bear Creek Coal Co.*, 43 Mont. 269, 115 Pac. 673; 4 Labatt on Master & Servant, sec. 1362; *Cleveland, C. C. & St. P. Ry. Co. v. Sur-*

rells, 115 Ill. App. 615; *Illinois Steel Co. v. Brenshall*, 141 Ill. App. 36; note, 30 L. R. A. (n. s.), pp. 442-450.)

The true rule of law in cases where an employee is injured while acting in an emergency in an endeavor to save the property of his master was laid down in the case of *Hollenback v. Stone & Webster Eng. Corp.*, 46 Mont. 559, 129 Pac. 1056; also recently in the case of *Nelson v. Northern Pacific Ry. Co.*, 50 Mont. 516, 148 Pac. 392. (See, also, *Da Rin v. Casualty Co.*, 41 Mont. 175, 137 Am. St. Rep. 709, 27 L. R. A. (n. s.) 1164, 108 Pac. 653; *Bracey v. Northwestern Imp. Co.*, 41 Mont. 338, 137 Am. St. Rep. 738, 109 Pac. 706; 4 Thompson on Negligence, sec. 4682; 5 *Id.*, secs. 5439, 5440; *Central R. R. & B. Co. v. Chapman*, 96 Ga. 769, 22 S. E. 273.) "A servant is not ordinarily guilty of contributory negligence, it would seem, where injured while making a reasonable effort to save the property of his master in an emergency." (2 Bailey on Master & Servant, sec. 501; *Prophet v. Kemper*, 95 Mo. App. 219, 68 S. W. 956; *Perrier v. Dunn Worsted Mills*, 29 R. I. 396, 71 Atl. 796; *Barry v. Hannibal St. Joe R. R. Co.*, 98 Mo. 62, 14 Am. St. Rep. 610, 11 S. W. 308; *Fox v. Chicago, St. P. & K. C. Ry. Co.*, 86 Iowa, 368, 17 L. R. A. 289, 53 N. W. 259; *Terre Haute I. R. Co. v. Fowler*, 154 Ind. 682, 48 L. R. A. 521, 56 N. E. 228; *Pullman Palace C. Co. v. Laack*, 143 Ill. 242, 18 L. R. A. 215, 32 N. E. 285; 3 Labatt on Master & Servant, sec. 1277; *Harding v. Ostrander Ry. & Timber Co.*, 64 Wash. 224, 116 Pac. 637.)

The negligence of the defendant in failing to inclose the weight-guide was the proximate cause of plaintiff's injuries. (*Mize v. Rocky Mountain Bell Tel. Co.*, 38 Mont. 521, 129 Am. St. Rep. 659, 16 Ann. Cas. 1189, 100 Pac. 973.) In this connection it should not be overlooked that the authorities do not hold that the proximate cause is not necessarily the last cause that produces a result, but that it is that cause which produces, or actively aids in producing, the same. In other words, it is that cause which concurs with the last cause to produce the result. (*Missouri K. & T. Ry. Co. v. Ryon* (Tex. Civ.), 177 S. W. 525; *Frederick v. Hale*, 42 Mont. 153, 112 Pac. 70; *Lyon v. Chicago*,

M. & St. P. Ry. Co., 45 Mont. 33, 121 Pac. 886; *A. M. Holter Hardware Co. v. Western M. & W. T. Co.*, 51 Mont. 94, L. R. A. 1915F, 835, 149 Pac. 490, 10 N. C. C. A. 316; *Mathis v. Granger Brick & Tile Co.*, 85 Wash. 634, 149 Pac. 3; *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 18 L. R. A. 215, 32 N. E. 285.) A case somewhat similar to the case at bar is that of *Mullin v. Northern Mill Co.*, 53 Minn. 29, 55 N. W. 1115; and one which we believe is on all-fours with this case, is *Siegel, Cooper & Co. v. Trcka*, 218 Ill. 559, 109 Am. St. Rep. 302, 2 L. R. A. (n. s.) 647, 75 N. E. 1053. (See, also, *Balzer v. Waring*, 176 Ind. 585, 48 L. R. A. (n. s.) 834, 95 N. E. 257.)

Messrs. Kremer, Sanders & Kremer, for Respondent, submitted a brief; *Mr. L. P. Sanders* argued the cause orally.

Where no sudden, imminent or impending peril confronts a person, and he admits that all of the surrounding circumstances and conditions were fully known to him, he may be held to have assumed the risk. As pointing out the logical reason for distinguishing between the rule that relieves a servant from the charge of contributory negligence but does not abate the defense of assumed risk, see 3 Labatt, 3227, 3513. Where the master and servant are possessed of equal knowledge of defects and danger, or where they are equally ignorant thereof, the servant assumes the risk; and the same is true where the servant has better means of knowledge than the master. (26 Cyc. 1202; 8 Thompson on Negligence, sec. 4643.) If a servant places himself in a position where he is injured, his precedent actions must be considered, and if they show lack of care on his part, he is not relieved from the claim that he was guilty of contributory negligence. (*Dummer v. Milwaukee Elec. Ry. etc. Co.*, 108 Wis. 589, 84 N. W. 853; *Richmond Ry. etc. Co. v. Hudgins*, 100 Va. 409, 41 S. E. 736; *Chattanooga Elec. Ry. Co. v. Cooper*, 109 Tenn. 308, 70 S. W. 72; *Hess v. Baltimore etc.*, 28 Pa. Sup. Ct. 220; *Chicago etc. R. Co. v. Corson*, 198 Ill. 98, 64 N. E. 739.) The doctrine of sudden emergencies may not be invoked with strictness where one voluntarily and wrongfully

puts himself in a dangerous position. (*Birmingham Ry. etc. Co. v. Fox*, 174 Ala. 657, 56 South. 1013.)

There was no element of imminent danger confronting appellant at any time; if there was, it was created by the plaintiff himself, and the rule finds no application. (*Chesapeake & O. R. Co. v. Hall's Admr.*, 109 Va. 296, 63 S. E. 1007.) The fact that he received a general order "to go down there and fix it or get it fixed" does not render such an order one that may be held negligent. He was master of his own movements. He was not ordered to hurry, but even so, an order to hurry does not render an order a negligent one. (*Coyne v. Union Pac. R. Co.*, 133 U. S. 370, 33 L. Ed. 651, 10 Sup. Ct. Rep. 382; *Sauer v. Union Oil Co.*, 43 La. Ann. 699, 9 South. 566; *English v. Chicago etc. R. Co.*, 24 Fed. 906; *Peterson v. Chicago, R. I. & P. R. Co.*, 149 Iowa, 496, 46 L. R. A. (n. s.) 766, 128 N. W. 932.) The order of Henningsen was a general one. (*Standard Cement Co. v. Minor*, 54 Ind. App. 301, 100 N. E. 767.) There is no evidence in this case that appellant was sent into a position of danger to perform a dangerous task. But even this would not raise an inference of negligence from the order given. (*Turner v. Southern Pacific Co.*, 142 Cal. 580, 76 Pac. 384; *Spencer v. Ohio etc. Ry. Co.*, 130 Ind. 181, 29 N. E. 915; *Slota v. Albert Lewis Lumber etc. Co.*, 215 Pa. 434, 64 Atl. 632.)

The rule laid down in *Morris v. Lake Shore etc. Ry. Co.*, 148 N. Y. 182, 42 N. E. 579, under a contention that plaintiff was guilty of contributory negligence, would find application here. (See, also, *Condiff v. Kansas City etc. R. Co.*, 45 Kan. 256, 25 Pac. 562; *Farrell v. Tatham*, 36 App. Div. 319, 55 N. Y. Supp. 199; *Cook v. Johnston*, 58 Mich. 437, 55 Am. Rep. 703, 25 N. W. 388; *Richfield v. Michigan Cent. R. Co.*, 110 Mich. 406, 68 N. W. 218.)

Failure to "inclose the said portion of said elevator shaft in the basement where said counterweights descended" is the negligence charged. It appears that it would have been impracticable to nail boards on the inside of the guide-posts. There is no evidence that such an inclosing would have been prac-

licable. Ignoring for the moment the fact that it was not customary, it was incumbent for appellant to show that it was practical. (*Tyma v. Tarant F. Co.*, 144 Ill. App. 454; *Glockner v. Hardwood Mfg. Co.*, 109 Minn. 30, 18 Ann. Cas. 130, 122 N. W. 465, 123 N. W. 807; *Shaver v. J. Neils L. Co.*, 109 Minn. 376, 123 N. W. 1076; *Wynkoop v. Ludlow Valve Mfg. Co.*, 196 N. Y. 324, 30 L. R. A. (n. s.) 36, 89 N. E. 827.)

The duty of the employer to guard machinery is restricted to such dangers as the servant is reasonably expected to come in contact with in the ordinary course of events. (*Powalske v. Cream City Brick Co.*, 110 Wis. 461, 86 N. W. 153; *Vigo Coöperage Co. v. Kennedy*, 42 Ind. App. 433, 85 N. E. 986; *Valparaiso Lighting Co. v. Letherman*, 46 Ind. App. 303, 92 N. E. 346.) "An injury which could not have been foreseen or reasonably anticipated as a probable result of an act of negligence is not actionable, and such an act is either the remote cause or no cause whatever of the injury." (*Cole v. German Savings & Loan Soc.*, 124 Fed. 113, 63 L. R. A. 416, 59 C. C. A. 593.) "A wisdom born after the event is the cheapest of all wisdom. Anybody could have discovered America after 1492." (*United States v. American Bell Tel. Co.*, 167 U. S. 224, 261, 42 L. Ed. 144, 17 Sup. Ct. Rep. 809.) "We are all very wise in finding out the causes which have led to particular events after the events have taken place." (*Marshall v. Union Ins. Co.*, 2 Wash. C. C. 357, 16 Fed. Cas. No. 9133.) "Wisdom that comes from the contemplation of an event after it has happened is of easy acquirement." (*Boland v. Combination Bridge Co.*, 94 Fed. 888, 893.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action for damages for a personal injury suffered by plaintiff during the course of his employment by defendant. The trial in the district court resulted in a judgment in favor of the defendant after an order sustaining its motion for a nonsuit.

Plaintiff has appealed from the judgment and an order denying his motion for a new trial.

The following narrative of facts is gathered from the complaint: On January 11, 1912, the defendant was conducting a warehouse and cold-storage business in the city of Butte. It occupied a brick building consisting of three stories and a basement. Besides stairways connecting the several floors, there was an elevator for conveying goods to and from them. The elevator was installed in a shaft and was moved by a cable and pulley. It was balanced by counterweights, which ascended and descended between two guides near the middle of the south side of the shaft. Plaintiff was in the employ of the defendant as superintendent of its business, and as such had charge of the building and defendant's employees. A. P. Henningsen was its president. Discovery having been made that the building was on fire on the basement floor, Henningsen directed the plaintiff to save as many of the goods stored in the building as possible. Assisted by the other employees he proceeded to remove such of them as he could without danger to his assistants or himself. To accomplish this, they loaded the goods upon trucks and removed the loaded trucks by means of the elevator to the first or street floor, and thence to the street. When this work was begun on the basement floor, it was discovered that because of an obstruction in the pit or excavation at the bottom of the shaft, the deck would not descend to the level of the floor, or "land," so that the trucks could be loaded upon it. Upon investigation this was found to be a piece of two by four timber standing on end at one side of the shaft. Seeing that this obstruction must at once be removed, the plaintiff ordered the elevator to be moved to the second floor and held there until he could effect the removal. The elevator was raised as directed. While plaintiff was reaching into the shaft to remove the timber, the elevator was moved upward by someone without warning, with the result that the counterweights descended and struck plaintiff, inflicting the injury complained of—a compound fracture of his right leg, besides bruises upon his back and head. The negligence

charged is: "That in the construction of said elevator shaft and particularly that portion of the same where the counterweights went up and down, according to the position of the said elevator, the said defendant carelessly and negligently failed and neglected to inclose that portion of said elevator in the basement on the south side where the said counterweights ascended and descended. * * * " The defenses relied on were a denial of negligence by defendant, and affirmative pleas that plaintiff assumed the risk, and that he was injured by the negligence of his fellow-servants. The motion for nonsuit was made upon several grounds. As we view the evidence, however, though we assume that defendant was guilty of negligence in the particular alleged—which is by no means clearly established by the proof—the nonsuit was proper on the ground that plaintiff's own evidence discloses a case of assumed risk.

The rule is settled in this jurisdiction that this defense can [1] be availed of only by special plea (*Longpre v. Big Blackfoot Milling Co.*, 38 Mont. 99, 99 Pac. 131; *Mosher v. Sutton's New Theater Co.*, 48 Mont. 137, 137 Pac. 534), and that the question whether the plaintiff did assume the risk is generally for the jury. An exception to this general rule is where the plaintiff's own evidence furnishes a basis for the single inference that he assumed the risk. The burden is then upon him to exculpate himself or he cannot recover, and this whether the defense is pleaded or not. (*Longpre v. Big Blackfoot Milling Co.*, *supra.*) The exception is founded upon the principle that in order to recover for an alleged wrong of his master, the servant must make out a case which does not afford a substantial basis for the inference that he has exculpated the master by taking responsibility upon himself.

The evidence establishes these facts: The fire was discovered [2] about 2:30 o'clock in the afternoon. The plaintiff was ordered by Henningsen to get the employees together and remove the goods from the building. The plan adopted was to load them on trucks and lower or raise the trucks to the main or street floor in order to reach railroad cars standing on a

siding used by the defendant. All goods had been removed, except those stored in the basement. It was then about 6 o'clock. The building was constructed with double walls, leaving air spaces between. The fire had originated in one of these air spaces, and by the efforts of the firemen had been prevented from spreading to other parts of the building or to the goods. When the rescuers began work in the basement, it was found that an obstruction in the elevator shaft prevented the proper placing of the deck for the loading of trucks upon it. This was made known to Henningsen by the plaintiff, both being then upon the street floor. The plaintiff testified as to what then occurred as follows: "I told him that a piece of timber or something had gotten underneath the elevator and they couldn't load it up. He asked me, he says, 'Well, can't you get it fixed?' Mr. Henningsen asked me what was the matter, and I told him there was something in the elevator pit, and that the elevator would not go down to the bottom to land, and we couldn't get the goods on, and he said, 'Can't you fix it?' He said, 'Go down there. We have to get the goods out of the way. We don't know what this fire is going to amount to.' Now, I was just about the landing of the stairway, and I told him I could, and he made the remark, 'It is a hell of a time for the elevator to get out of order.' " The plaintiff went immediately to the basement floor to get the elevator in order. The shaft was between six and seven feet square, and was built about corner posts. On the west it was open, so that one approaching from that direction could step from the basement floor into the pit or sump, which was about sixteen inches in depth. At that time the pit contained several inches of water. On the east the shaft was boarded up, but there was a doorway opening into it. The floor of the basement on this side was higher than on the west side, so that the bottom of the pit was about thirty inches below its level. On the north the shaft was boarded up. On the south it was open except for the space occupied by the guides for the counterweights, which had their footings on the lip of the pit somewhat to the west of the center. Goods were piled

on that side so near to the shaft that entrance could not be effected from that direction. There was a sixteen candle-power electric light so placed that it lighted the shaft pit sufficiently to enable one approaching from the west to see an obstruction in it. The piece of timber was found by plaintiff standing on end, and leaning against the lip of the pit on the east side in front of the door. It could have been reached easily and without any danger from the counterweights, by means of the door on the east side or by stepping into the pit. Instead of pursuing either of these courses, the plaintiff first called to those who were in charge of the elevator above to hold it until he gave the signal. Without waiting for a response he put his left foot on the west lip of the pit, his right upon the south between the guides, and leaned toward the east to reach the timber. While he was in that position, someone—the evidence does not disclose who—moved the elevator upward with the result that plaintiff's right leg was caught by the descending counterweights and injured as alleged. Plaintiff had been in the employ of the defendant about thirteen years, having worked for it as laborer and helper, and as traveling agent and superintendent. He had had experience as stationary engineer, had operated compressors, was familiar with machinery, and knew the mechanism of the elevator. He knew that when it was moved, the counterweights would move; fully realized that the course he was pursuing was perilous, and appreciated the fact that he might suffer injury if the elevator was moved. This is put beyond doubt by the fact that when he went to the shaft he ordered the elevator to be held until he gave the signal, and by his statement that he relied on the order thus given by him being obeyed. Evidently this order, if heard by the men above, was understood to mean that the elevator should not be lowered. However this may have been, under the circumstances the only conclusion permissible is that he deliberately took a chance that he would not be injured, for he did not claim that he was hurried or that his attention was distracted by the emergency of the fire, nor did he offer to explain why he pursued the course he did. The

only inference possible is that he did it to avoid stepping into the water or the necessity of passing around to the east side of the elevator shaft. At the time plaintiff went down by the direction of Henningsen, neither knew what was the cause of the trouble. When he discovered it, being familiar with the operation of the elevator and having observed the conditions and circumstances confronting him at the moment, his knowledge of the danger was superior to that of Henningsen, and he thus became the exclusive judge as to the course he should pursue. He thus assumed the risk, and hence cannot charge his injury to the negligence of defendant, if it was negligent in failing to inclose or box in the counterweights. (*Leary v. Anaconda C. Min. Co.*, 36 Mont. 157, 92 Pac. 477; *Fotheringill v. Washoe Copper Co.*, 43 Mont. 485, 117 Pac. 86; *Molt v. Northern Pac. Ry. Co.*, 44 Mont. 471, 120 Pac. 809; 26 Cyc. 1202; Bailey on Personal Injuries, sec. 459; 8 Thompson on Negligence, 4643.)

Counsel insist that the evidence presents a case of emergency [3] in which the plaintiff was injured in an endeavor to save the property of his master, and cite and rely upon these cases: *Da Rin v. Casualty Co.*, 41 Mont. 175, 137 Am. St. Rep. 709, 27 L. R. A. (n. s.) 1164, 108 Pac. 649; *Bracey v. Northwestern Imp. Co.*, 41 Mont. 338, 137 Am. St. Rep. 738, 109 Pac. 706; *Hollenback v. Stone & Webster E. Corp.*, 46 Mont. 559, 129 Pac. 1058, and *Nelson v. Northern Pac. Ry. Co.*, 50 Mont. 516, 148 Pac. 388. They have no application. In the first place, they deal altogether with the rule governing the defense of contributory negligence when a rescuer is injured in an attempt to save the life of another in the face of impending peril to the latter brought about by the negligence of the defendant, or to the case of an employee injured while endeavoring to save the property of his employer when there is imminent peril of its loss or destruction. In the second place, the evidence shows affirmatively that the plaintiff was not at the time of the accident confronted by impending peril of loss to defendant of its property moving him to pursue the course he did, but that he acted deliberately and without the impulse of momentary excitement.

Counsel challenge the propriety of several rulings of the trial court in excluding evidence. The contentions made in this behalf are without merit, for the double reason that most of the excluded evidence was subsequently admitted without objection, and that in view of the conclusions stated above the evidence excluded finally would not have removed the imputation to plaintiff that he assumed the risk.

The judgment and order are affirmed.

Affirmed.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

PETIT, RESPONDENT, v. SINCLIER, APPELLANT.

(No. 3,714.)

(Submitted January 25, 1917. Decided February 24, 1917.)

[163 Pac. 467.]

Real Property—Conveyances—Rescission—Fraud—Complaint—Sufficiency—Water Rights—Contracts in Writing—Parol Evidence—Variance—Briefs—Rules—Specifications of Error.

Real Property—Water Rights—Conveyances—Rescission—Fraud—Complaint.

1. Complaint in an action seeking rescission of a contract of sale of agricultural lands needing irrigation, which in effect alleged that, though defendant represented to plaintiff that the ranch "had plenty of water and that water was going to waste thereon," the only water available for irrigation purposes was such as had to be procured from other persons, was sufficient to charge fraud, even though an inference was permissible therefrom that water, not under the control of defendant, was procurable elsewhere.

[As to action to recover for false representations, see note in 18 Am. St. Rep. 555.]

Same—Fraud—Damages—Presumptions.

2. If the representations made by defendant, relating to a vital element of the contemplated transfer of land, were false and were relied upon by plaintiff, damage necessarily ensued to the latter.

On the question of measure of damages for fraudulent representations in sale or exchange of real estate, see notes in 8 L. R. A. (n. s.) 804; 16 L. R. A. (n. s.) 818.

On measure of damages for fraud in exchange of real property, see note in 38 L. R. A. (n. s.) 465.

Same—Contracts in Writing—Parol Evidence—Admissibility.

3. In a suit to rescind a written contract for the sale of land for fraud inducing it, the rule that a writing cannot be varied by parol does not apply.

Same—Water Rights—False Representations.

4. A paper appropriation of water rendered unavailable by prior claims could not meet defendant's representation that there was plenty of water on the land he sold to plaintiff.

Same—Evidence—Variance—What is not.

5. In suit for rescission of a written contract stipulating for a conveyance by defendant of a right to 150 cubic inches of appropriated water per second of the waters of a creek used in connection with the irrigation of defendant's land, evidence tending to show that defendant possessed no such right was not inadmissible as an attempt to vary the terms of a writing.

Appeal and Error—Briefs—Rules—Specifications.

6. Unless appellant's brief presents alleged error in the admission of evidence, in the manner pointed out by subsection b, section 3, of Rule X, rules of the supreme court, it is not entitled to consideration.

Appeal from District Court, Yellowstone County; Geo. W. Pierson, Judge.

Suit by Julia B. Petit against Naomi Sinclier. From a judgment for plaintiff and an order denying defendant's motion for new trial, defendant appeals. Affirmed.

Mr. C. R. Ingle, for Appellant, submitted a brief and argued the cause orally.

Mr. F. B. Reynolds, for Respondent, submitted a brief and argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

The plaintiff, Julia B. Petit, and the defendant, Naomi Sinclier, contracted in writing for the conveyance by the defendant to the plaintiff of a certain tract of land consisting of 161.19 acres in Carbon county, together with all the defendant's "right, title and interest in and to 150 cubic inches of appropriated water per second of time of the waters of Blue Water Creek, * * * and used in connection with the irrigation of said lands," and "one and one-half shares of the capital stock of Orchard Ditch Company, a Montana corporation," the consid-

eration to be \$500 cash, \$3,500 in two promissory notes secured by mortgage upon the property above mentioned, and a deed to certain real estate belonging to plaintiff in Billings (subject to a mortgage for \$2,000). The money was paid, the notes and mortgages were given, the deeds were delivered, and each party went into possession of the property exchanged in pursuance of the contract. Shortly thereafter the plaintiff brought this suit to enforce a rescission of the contract, to have returned to her the payment made, and to cancel the notes, mortgage and deed executed pursuant thereto, upon the ground that she was induced to enter into the same by the fraud of the defendant, alleged as follows: "That said contract was negotiated with plaintiff by defendant and her husband Isaac Sinclier, acting as and for her agent in said matter; that at and before the making of said contract, and as an inducement for plaintiff to enter into said contract, defendant and said Isaac Sinclier, acting as her agent, represented to plaintiff that said ranch, then owned by defendant and mentioned in said contract, had plenty of water for purposes of irrigation, and that water was going to waste thereon, and that it was the intention of defendant and her said agent thereby to inform plaintiff and have her understand that water in defendant's own right was available at said ranch for the purposes of irrigation, and was so situated as to be reasonably efficient for irrigation purposes, and that such representations were material, and the truth or falsity thereof vitally affected the value and utility of said lands; that said representations were false and fraudulent, were known by defendant and said Isaac Sinclier to be false, in that they did not have at that time, had not had previously, nor has she had since that time any water that, under existing conditions, could be delivered to said ranch; that no water has at any time been plentiful enough upon said ranch that it has gone to waste thereon, and that the only waters that have been available for the irrigation of said ranch within at least the past year have been waters procured from a private ditch of a third party, and

in which water defendant has not conveyed, and cannot convey, to plaintiff any interest."

The cause was tried to the district court of Yellowstone county sitting without a jury, and such trial resulted in findings of fact and conclusions of law favorable to the plaintiff. Judgment was entered conformable to the prayer of the complaint, and from it, as well as from an order denying the defendant's motion for new trial, these appeals are taken.

The main contention is that the representations alleged in [1] the complaint do not constitute fraud, "do not put in issue the question of sufficiency of water, and are pregnant with the admission of plenty of water." This is clearly untenable, if we understand it aright. The parties were dealing with respect to certain lands which confessedly require water for their most successful use; the availability of such water in quantity sufficient for the purpose was therefore a vital consideration, and any false representation touching that and relied upon must of necessity be a fraud. The representation alleged, in connection with this matter, is "that said ranch had plenty of water, and that water was going to waste thereon." This conveyed, and must have been intended to convey, the idea that the defendant owned or controlled and could transfer with said lands a right to the use of water sufficient in quantity and so situated as to be usable at her will for the irrigation of all the lands. It does not aid her, nor adversely affect the complaint, to say that it permits the inference of "plenty of water" in the creek or elsewhere, if that water was, for any reason, not subject to her command.

It is further contended that the evidence does not justify the result, in that the statement imputed to the defendant was true, and that the plaintiff was not shown to have relied upon it or to have been damaged by it. It is a permissible inference from the evidence that the total flow of Blue Water Creek during the irrigation season is not sufficient to supply the rights confessedly prior to that transferred by the defendant to the plaintiff, and that in point of fact neither the defendant nor her predecessors

in interest ever posted any notices at the point of diversion pursuant to such claim of appropriation, or ever perfected the same by the construction of ditches, or ever diverted any water claimed thereunder, save through the Orchard Company ditch. It is true that on one occasion, for a period of about five days, such diversion amounted to something like 108 inches; but this was due to the complaisance of others, who might have interfered. Her interest in the Orchard ditch, as covered by the contract, was only one and one-half shares, or three-fortieths of its total carrying capacity, and the total carrying capacity of that ditch did not exceed 500 inches. A consideration of the entire record satisfies us that the court was justified in its finding against the truth of defendant's representations. So, too, there was warrant for the inference that the plaintiff relied upon these representations. She says she did, and she could not have done otherwise. She might—as she did—cause an examination of the records to be made and thus be held to know what the records would disclose. But the existence of prior rights sufficient to consume all the waters of the creek could not be definitely ascertained from the records, because they might not show the total flowage of the creek and would not show what deductions could be made for abandonments, nonuser or return of waters to the creek. It is needless to add that if the representations which [2] related to a vital element of the transaction were false and were relied on, damage necessarily ensued.

Again it is insisted “that the written contract, having fixed [3] the amount of water, cannot be varied by parol, and the amount of water or priority is not in issue.” The answer is threefold: (a) This is a suit to enforce a rescission for fraud inducing the contract; hence the rule invoked does not apply. (*Hillman v. Luzon Café Co.*, 49 Mont. 180, 142 Pac. 641; *Sathre v. Rolfe*, 31 Mont. 85, 77 Pac. 431.) (b) The amount, as measured by the needs of the place, and the priority of defendant's right, as affecting the availability of the water claimed thereunder, were distinctly put in issue; the existence of a mere [4] paper appropriation, rendered unavailing by prior claims

taking up all the source of supply, could not meet the representations. (c) The written contract stipulated a conveyance [5] by defendant of a right to "one hundred fifty cubic inches of appropriated water per second of time of the waters of Blue Water Creek, used in connection with the irrigation of said lands." The evidence which tended to show that there was no such right can hardly be condemned as a variation of the terms of the written contract.

Finally, attention is called in a general way to certain rulings in the admission of evidence which, it is said, were erroneous. None of these appear to have been open to the objection argued [6] in the brief. Moreover, there is no such specification as under Rule X, section 3, subdivision "b," rules of this court (123 Pac. xii), entitled them to consideration here.

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

RHOADES, APPELLANT, v. NESS, RESPONDENT.

(No. 3,734.)

(Submitted January 27, 1917. Decided February 24, 1917.)

[163 Pac. 559.]

New Trial Order—Affirmance, When.

New Trial Order—General in Terms—Affirmance, When.

1. An order general in terms granting a motion for new trial will be affirmed if it can be justified upon any one of the statutory grounds assigned in the motion.

Same—Conflict in Evidence—Affirmance.

2. Where the evidence is conflicting, the granting or refusal of a new trial is within the sound legal discretion of the trial court.

*Appeal from District Court, Cascade County; J. B. Leslie,
Judge.*

ACTION by B. L. Rhoades against J. O. Ness. From an order granting defendant a new trial, plaintiff appeals. Affirmed.

Messrs. O'Leary & Reynolds, for Appellant, submitted a brief; *Mr. W. F. O'Leary* argued the cause orally.

Messrs. Cooper & Stephenson and *Mr. J. W. Speer*, for Respondent, submitted a brief; *Mr. J. A. Kaufman*, of Counsel, argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

Appeal by plaintiff from an order granting a motion for new trial. The motion was made upon all the statutory grounds, [1] save only that the verdict is against law, and the order sustaining it is a general one. We must therefore affirm the order if it can be justified upon any of the grounds assigned in the motion. (*Reynolds v. Jones*, ante, p. 251, 163 Pac. 469; *Scott v. Waggoner*, 48 Mont. 536, L. R. A. 1916C, 491, 139 Pac. 454.) The issue was whether there had been an account stated between the parties, and the record shows a continuous conflict of evidence upon that issue. It must be taken as settled that [2] where the evidence is conflicting, the granting or refusal of a new trial is within the sound legal discretion of the trial court. (*Reynolds v. Jones*, supra; *Walsh v. Conrad*, 35 Mont. 68, 88 Pac. 655.)

The order is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

**HANSON SHEEP CO., APPELLANT, v. FARMERS &
TRADERS' STATE BANK, RESPONDENT.**

(No. 3,717.)

(Submitted November 27, 1916. Decided March 1, 1917.)

[163 Pac. 1151.]

*Corporations—Officers and Directors—Duties and Powers—
Estoppel—Fraud—Burden of Proof—Bank Deposit—Pass-
book—Pleading and Practice—General Denial—Evidence—
Admissibility—Cross-examination—Harmless Error.*

Appeal and Error—Conflict in Evidence—Verdict—Conclusiveness.

1. Where the jury finds a verdict on conflicting evidence, the supreme court will on appeal assume that the facts were as claimed by the prevailing party.

Banks—Pass-book—Effect, When Accepted as Correct.

2. The balance disclosed by a pass-book when accepted as correct, becomes an account stated between the bank issuing it and the depositor, which, until changed by other dealings between them, fixes the amount due the latter, unless fraud, mistake or error intervened in ascertaining it.

[As to effect of balances struck in pass-books, see note in 134 Am. St. Rep. 1019.]

Corporations—Officers and Directors—Duties.

3. By virtue of their fiduciary relation to the stockholders neither the president nor the directors of a corporation may divert its assets to any use other than such as will serve the purpose of its organization, and hence may not in any event appropriate the assets to their own use.

Same—Officers and Directors—Burden of Proof.

4. When it appears that the president or a director of a corporation has been dealing with it, the burden is upon him to show that his dealings have been fair and honest.

Same—Acts of Officers and Directors—Estoppel.

5. Where a corporation, with neither board of directors nor secretary, had permitted its president to exercise all its powers and functions for seven years after its organization, he was, so far as the corporation was concerned, possessed of all the powers of the board of directors, and the corporation was estopped to question any of his acts within the scope of its legal powers.

Same—Bank Deposit—Authority to Apply.

6. Where the president of a corporation, the stock of which, with the exception of a small portion nominally held by his wife and a brother, was owned by himself, used the corporate name as a cloak under which to conduct his own business, a bank familiar with his manner of conducting the affairs of the ostensible corporation was justified in acting upon his oral direction and applying a deposit made in the corporate name to the payment of notes given it by him to secure private indebtedness.

Same—Fraud—Power of Courts.

7. The rule that the legal capacity of a corporation cannot be inquired into collaterally by a private person in a controversy between it and him does not preclude courts to examine into the facts of a particular case to determine the identity of a person who uses the name of a corporation for his own purposes, and to fix liability upon him for the ostensible corporate acts.

Pleading and Practice—General Denial—Evidence—Admissibility.

8. Evidence of any fact which is inconsistent with, and thus negatives, plaintiff's cause of action, is admissible under a general denial.

Same.

9. Defendant bank was, under its general denial, properly permitted to show that a balance appearing on plaintiff's pass-book had been exhausted by an appropriation made of it by plaintiff through the means of checks which had been paid by his direction.

Appeal—Harmless Error—Cross-examination.

10. Technical error in permitting cross-examination of plaintiff as to matters about which he had not testified in chief is harmless, and therefore insufficient to work a reversal, where prejudice is not apparent or pointed out.

Corporation—Fraud—Evidence—Admissibility.

11. In an action of the kind referred to above, evidence elicited from the president of the corporation as to his relations with it, the extent of his interest and control over it, the ownership of shares of capital stock, and all other facts tending to show that it was merely a colorable corporation, was competent.

Appeal from District Court, Yellowstone County; Geo. W. Pierson, Judge.

ACTION by the Hanson Sheep Company against the Farmers & Traders' State Bank. From a judgment for defendant and an order denying its motion for new trial, plaintiff appeals. Affirmed.

Messrs. Loud, Collins, Campbell, Wood & Leavitt, for Appellant, submitted a brief; *Mr. S. M. Wood* argued the cause orally.

The appropriation by defendant bank of the deposit of plaintiff corporation to the payment of the individual note of A. S. Hanson was a fraudulent appropriation. A deposit belongs to the person in whose name it is entered, and a bank is estopped to question a depositor's right thereto. (*Murphy v. Nett*, 51 Mont. 82, L. R. A. 1915E, 797, 149 Pac. 713; *Patterson v. Marine Nat. Bank*, 130 Pa. 419, 17 Am. St. Rep. 779, 18 Atl. 632; *Nehawka Bank v. Ingersoll*, 2 Neb. Unof. 617, 89 N. W. 618;

First Nat. Bank v. Mason, 95 Pa. St. 113, 40 Am. Rep. 632; *Lund v. Seamen's Bank*, 37 Barb. (N. Y.) 129; 5 Cyc. 517.)

Furthermore, the defendant bank has stated an account with the plaintiff corporation by the act of balancing plaintiff's pass-book upon April 2, 1914, and the bank cannot therefore be heard to say that the balance to the credit of the plaintiff was not due and owing, on April 2, 1914, to it in its corporate capacity. (3 R. C. L., "Banks," par. 161, and cases; *Schoonover v. Osborne*, 108 Iowa, 453, 79 N. W. 263; *Nodine v. First Nat. Bank*, 41 Or. 386, 68 Pac. 1109; *Greenhalgh Co. v. Farmers' Nat. Bank*, 226 Pa. 184, 134 Am. St. Rep. 1016, 18 Ann. Cas. 330, 75 Atl. 260; 1 Morse on Banks, 3d ed., par. 291.) There is no fraud, error or mistake claimed with respect to this stated account, nor is any such claim set forth in defendant's answer; and therefore it is concluded by the stated account from contending that it is untrue. (*Noyes v. Young*, 32 Mont. 226, 79 Pac. 1063.)

Let it be assumed that the direction claimed to have been given to the cashier of defendant bank by A. S. Hanson, president, was in fact given as claimed by the defendant, to-wit, to charge the account with the notes; it still follows that the direction and any appropriation of moneys thereunder was fraudulent and wholly illegal. (*McConnell v. Combination Mining & Milling Co.*, 30 Mont. 239, 104 Am. St. Rep. 703, 76 Pac. 194; s. c., 31 Mont. 563, 79 Pac. 248; *Kleinschmidt v. American Mining Co., Ltd.*, 49 Mont. 7, 139 Pac. 785; *Sims v. Petaluma Gaslight Co.*, 131 Cal. 656, 63 Pac. 1011; secs. 5375, 5380, Rev. Codes.) Any such direction, if given by A. S. Hanson, as president, did not bind the corporation. (*El Capitan Land & Cattle Co. v. Boston-Kansas C. C. L. Co.*, 65 Kan. 359, 69 Pac. 332; *Leigh v. American Brake B. Co.*, 205 Ill. 147, 68 N. E. 713.)

The authority to the bank, if given, was wholly outside the scope of the business of the plaintiff corporation, *ultra vires* and void. (*Central Transp. Co. v. Pullman Palace Car Co.*, 139 U. S. 24, 35 L. Ed. 55, 11 Sup. Ct. Rep. 478; *California Nat.*

Bank v. Kennedy, 167 U. S. 362, 42 L. Ed. 198, 17 Sup. Ct. Rep. 831; *Westerlund v. Black Bear Min. Co.*, 203 Fed. 599, 121 C. C. A. 627; *Kellogg-MacKay Co. v. Havre Hotel Co.*, 199 Fed. 727, 118 C. C. A. 165; *Metropolitan Stock Exchange v. Lyndonville Nat. Bank*, 76 Vt. 303, 57 Atl. 101; *Hillsdale College v. Rideout*, 82 Mich. 94, 46 N. W. 373; *Greene v. Middlesborough Town & Lands Co.*, 121 Ky. 355, 11 Ann. Cas. 888, 89 S. W. 228; *Best Brewing Co. v. Klassen*, 185 Ill. 37, 76 Am. St. Rep. 26, 50 L. R. A. 765, 57 N. E. 20.)

No authority was given defendant bank in writing. (Rev. Codes, sec. 4962.)

The dishonor of the checks made the bank liable to plaintiff for their amount, together with a further sum, reasonable and temperate in amount, as damages for the wrongful act complained of, without allegation or proof of special damage. (*Siminoff v. James H. Goodman & Co. Bank*, 18 Cal. App. 5, 121 Pac. 939; *Weller v. Western State Bank*, 18 Okl. 478, 90 Pac. 877, 881; *J. M. James Co. v. Continental Nat. Bank*, 85 Tenn. 1, 80 Am. St. Rep. 857, 51 L. R. A. 255, 58 S. W. 261; *Schaffner v. Ehrman*, 139 Ill. 109, 32 Am. St. Rep. 192, 15 L. R. A. 138, 28 N. E. 917; *American Nat. Bank v. Morey*, 113 Ky. 857, 101 Am. St. Rep. 379, 58 L. R. A. 956, 69 S. W. 759; *Patterson v. Marine Nat. Bank*, 130 Pa. 419, 17 Am. St. Rep. 779, 18 Atl. 632; *Lorick v. Palmetto Bank & Trust Co.*, 74 S. C. 185, 7 Ann. Cas. 818, 54 S. E. 206; *Wood v. American Nat. Bank*, 100 Va. 306, 40 S. E. 931; *Atlanta Nat. Bank v. Davis*, 96 Ga. 334, 51 Am. St. Rep. 139, 23 S. E. 190; *Baumgarten v. Alliance Assur. Co.*, 159 Fed. 275; *Svendson v. State Bank of Duluth*, 64 Minn. 40, 58 Am. St. Rep. 522, 31 L. R. A. 552, 65 N. W. 1086; *Bank of Commerce v. Goos*, 39 Neb. 437, 23 L. R. A. 190, 58 N. W. 84; *First Nat. Bank of Tamaqua v. Shoemaker*, 117 Pa. 94, 2 Am. St. Rep. 649, 11 Atl. 304; *Robinson v. Wiley*, 188 Mass. 533, 74 N. E. 923; *Kleopfer v. First Nat. Bank*, 65 Kan. 774, 70 Pac. 880; 5 Cyc. 535.)

Whether the defense be regarded in law as a release, payment or an accord and satisfaction, it is nevertheless settled law

that the defense should have been specially pleaded and was not available to the defendant under its answer. (34 Cyc. 1094; 18 Ency. of Pl. & Pr. 89, 90; 16 Ency. of Pl. & Pr. 174 *et seq.*; 1 R. C. L., "Accord and Satisfaction," par. 40 and cases; 1 Cyc. 341, and cases.)

Messrs. Nichols & Wilson and *Mr. M. Brown*, for Respondent, submitted a brief.

In this case we have the following situation:

Albert S. Hanson, as sole official of the company, does some act for the benefit of Hanson individually. Hanson, as stockholder, and in the name of the company, now seeks to avoid the result, it having become apparent that he would gain by repudiating it. He claims that his conduct as president was illegal, because it was *ultra vires* and a violation of a trust relation to himself as beneficiary, and seeks now the aid of a court in his behalf. If there were involved here the interests of innocent stockholders, and complaint was being made by them or in their behalf, an entirely different question would be presented. Here Hanson alone is complaining. Under the record, who was the beneficiary? Hanson alone. Who committed the acts of which complaint is made? Hanson. Who will derive a benefit if the acts are avoided? Hanson. The law will not permit a man to assume such inconsistent positions, and thereby enrich himself at the expense of the party with whom he deals. (*Edwards v. Plains L. & W. Co.*, 49 Mont. 535, 143 Pac. 962; *First National Bank v. G. V. B. Mining Co.*, 89 Fed. 444.)

Counsel urge that the act of Hanson, even conceding it was authorized, was beyond the scope of its business and *ultra vires*. To this proposition there are three sufficient answers:

(1.) There is no evidence that the act was *ultra vires*. The act is presumed to be within the granted powers, and the burden of proving the act beyond such powers rests on the party making the complaint. (Thompson on Corporations, sec. 2779.)

(2.) Officers who have been guilty of acts which may be *ultra vires* are not permitted to make complaint on that ground.

A stockholder even must show a substantial injury to himself, and he must show that he has not authorized or acquiesced in the acts of which he makes complaint. Hanson, the officer and stockholder, is certainly barred from the privilege of making any such claim as to his own act. (*Id.*, secs. 2846-2849.)

✓ (3.) The doctrine will not be given effect either for or against the corporation when it would defeat the ends of justice. (*Id.*, sec. 2778, and cases.)

It was incumbent on the plaintiff to prove, not only that he had placed money in the bank subject to check, sufficient in amount to meet the various checks, but that he had not withdrawn it at or before the presentation of the checks in question. Evidence that the money had been withdrawn, or the account depleted by either checks drawn against the account by the plaintiff or by someone authorized by it, goes directly to the question that the funds were in fact not in the bank to the credit of the account when the checks were presented. (*Reynolds v. Fitzpatrick*, 28 Mont. 170, 175, 72 Pac. 510; *Gallick v. Bordeaux*, 31 Mont. 328, 337, 78 Pac. 583; *Hickey v. Breen*, 40 Mont. 368, 373, 20 Ann. Cas. 429, 106 Pac. 881.)

If the defendant was claiming or attempting to prove that the particular checks involved in the suit had in fact been paid by it, there might be some force to the contention of the appellant that under the answer the proof could not be made. It is true that some of the Code states do not permit proof of payment under the general issue, except where the indebtedness is declared upon in general terms. This, however, is not true, where an averment of nonpayment in the complaint is regarded as material. Such is the rule in California and some other states. (*Mickle v. Heinlen*, 92 Cal. 596, 28 Pac. 784; *State v. Peterson*, 142 Mo. 526, 39 S. W. 453, 40 S. W. 1094; *Knapp v. Roche*, 94 N. Y. 329, 333.) In the present case it was specifically alleged in the complaint that at the date of drawing the checks in question and upon which they were presented for payment, there were funds sufficient to meet the same to the credit of the plaintiff. The answer denied this averment, and under the issue so

presented the defendant clearly had the right to show that the funds on deposit had been paid out under the direction of the plaintiff for other purposes prior to the presentation of said checks.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The plaintiff, as a trading corporation whose office and principal place of business is at Billings, in Yellowstone county, through Albert S. Hanson, as its president, and from March 30, 1914, to April 7, inclusive, drew checks upon its deposit account in the defendant bank to the order of various persons to whom it was indebted, and delivered them in payment of amounts due thereon. On April 8 these several checks were presented for payment, but payment was refused and they were returned to the plaintiff. On April 11, with the apparent purpose of closing up the account with defendant and transferring it to some other institution, Hanson drew a check payable to "currency" for the whole balance claimed to be due less the amount of checks theretofore drawn, and presented it in person for payment. The defendant refused to pay this also. Plaintiff thereupon brought this action to recover the amount of the several checks and for damages, alleging wrongful refusal to pay them. Each check is made the subject of a separate cause of action; plaintiff alleging that when it was drawn and presented there was deposited with defendant, subject to check, an amount more than sufficient to pay it. Defendant, admitting that all the checks were drawn and presented for payment as alleged, denied that plaintiff had upon deposit, subject to check, a sum sufficient to pay them, or any sum whatever. A trial to a jury resulted in a verdict and judgment for defendant. Plaintiff has appealed from the judgment and an order denying its motion for a new trial.

The inquiry at the trial was whether the deposit account had been exhausted before the checks were presented. Counsel for plaintiff contend that there is no evidence to justify the finding

of the jury in this behalf. The facts disclosed by the evidence are these: The corporation was formed during the year 1907. Hanson transferred to it the business he had theretofore conducted, including all the property theretofore used by him in connection with it. Hanson, his wife, and Trogdon, a hired man, were its organizers and became the owners of the entire capital stock. They became its directors and officers, Hanson being its president, his wife vice-president, and Trogdon secretary and treasurer. Mrs. Hanson became the owner of one share of stock of the par value of \$100, paying therefor \$1. In 1912 she became the owner of 100 other shares, paying as a consideration therefor \$1 and her help to Hanson. Trogdon purchased one-third of the shares. He gave his note to Hanson for an unpaid balance of the purchase price, who held the certificates as collateral security. Ostensibly the mode of conducting the business was not changed by the organization thus effected, except in the use of the corporate name. Trogdon having failed to pay in full for his shares, and differences having arisen between him and his wife and Hanson, the shares were taken over by Hanson. This was in 1912. From that time until early in March, 1914, Hanson and his wife owned all the shares. At this time a brother of Hanson residing in Oregon acquired shares in the corporation in excess of 100, but the exact amount does not appear. He is referred to by Hanson as a director, but it does not appear when, if ever, he was elected. So far as the record discloses, no meeting of the directors or stockholders was ever had subsequent to the preliminary organization. By-laws were then adopted, but the record of such proceedings as were thereafter had were kept by Hanson in the form of notes and memoranda until this controversy arose. It appears that the brother of Hanson never took any part in the conduct of the business of the corporation and was never present in Montana after he acquired his shares. The corporation became a customer of the defendant in July, 1910, keeping a checking account with it and borrowing funds from it as the exigencies of the business required. Payment of the funds borrowed from

time to time was secured by promissory notes executed in the name of the corporation by "Albert S. Hanson," without official designation, and by him personally as security. A pass-book was kept in the name of the corporation from the time the account was opened until this controversy arose. Hanson kept a separate individual account with the defendant. He also borrowed money from it from time to time, giving his personal notes as security. This course of dealing continued until April 2, 1914. On that date the books of the defendant and the pass-book of the plaintiff showed a balance in plaintiff's favor of \$14,316.91. This amount had been obtained by the sale of sheep ostensibly belonging to plaintiff, and had been deposited by Hanson on that day. There were then outstanding checks of plaintiff to the amount of \$826.60. These had been presented and paid before those involved herein were presented. The balance left was \$13,490.31, and was sufficient to pay all of the latter. The plaintiff was then indebted to defendant to the amount of \$3,500 upon his promissory note dated February 27, and due on or before August 27 following. Hanson was also indebted to the defendant by promissory note of the same date as that of plaintiff and due at the same time, to the amount of \$12,000. These notes were renewals of other notes theretofore given for borrowed money. At the time the deposit of April 2 was made it was agreed between Hanson and the defendant's officers that the amount of the deposit should be applied first to the discharge of plaintiff's note, and then *pro tanto* to that of Hanson. This agreement was made in pursuance of an understanding had on February 27, when the notes were executed, that when a sale of the sheep belonging to the plaintiff, then in contemplation, should be made, the proceeds should be applied to the payment of the notes; the words "on or before" having been inserted in order to permit plaintiff to do this. This understanding was the consideration upon which the renewals were made. The deposit was made on Thursday afternoon, April 2. Hanson agreed to come in on the next day and give defendant plaintiff's check for the amount of the balance, but did not come in until

Saturday, April 4, after the close of business for the day. Instead of giving the check, he directed Mr. Price, the cashier, to charge the account with the balance and credit the notes. Sunday and the following Monday being holidays, the instructions then given were carried out on Tuesday, the checks representing the sum of \$826.60 having in the meantime been presented and paid as heretofore stated. When the checks in controversy were presented, the account had in this way been exhausted.

There was a conflict in the evidence as to the understanding [1] between Hanson and the officers of defendant when the notes were renewed, as well as to the making of the agreement that the defendant should credit the amount of the balance on the notes when it was deposited. Inasmuch as the jury found the issues for the defendant, we must assume for the purposes of these appeals that the facts were as claimed by defendant. Mr. Mains, the president of the defendant, and Mr. Price, its cashier, testified that they had often talked with Hanson about the business affairs of himself and the corporation, that they had considered Hanson and the corporation as one and the same person, and that they knew that the money borrowed by Hanson on the notes was intended to be used, and was used, by himself, for himself and the business of the corporation indifferently, he having no business other than that carried on in the name of the corporation. Mr. Price testified that Hanson had told him and the other officers of the defendant that the business of the corporation was his. Both said in effect that, since the corporate stock of the defendant was only \$50,000 they could not lawfully lend to a single person more than 20 per cent of this amount, and hence that the indebtedness to the defendant was evidenced by the notes executed as they were, in the names of Hanson and the corporation, to avoid a violation of the prohibition of the statute on the subject. Hanson drew checks upon either his personal account or that of the corporation as it suited his convenience, for money used in the business. There is some evidence which tends to show that the disposition made of the deposit by the officers of the defendant was at the time entirely satisfactory to

Hanson, but that he subsequently changed his mind because he understood or surmised from the conduct of Mr. Mains and Mr. Price that he could not secure further loans of funds for use in trade during the coming summer months. The paid-up capital stock of the corporation was ostensibly \$42,000, but the number of shares into which it was divided does not appear, except by inference from the fact that their par value is \$100. At the time the present controversy arose it had unencumbered property of the value of \$5,000 or \$6,000. Aside from his shares of stock and his interest in the proceeds of the sale of sheep by way of dividends, Hanson himself had no property of substantial value. He denied that he had used the money represented by his note in the business of the corporation, but claimed that he had used it in farming operations in different places in Yellowstone county. This statement is not corroborated in any way, and in view of the testimony of Mains and Price as to the purpose for which Hanson borrowed the money, we may assume that the jury rejected his claim as not in accord with the facts. It may be added that he stated that he always consulted the board of directors in regard to the conduct of the business. By this statement he evidently meant that he consulted his wife only, as is apparent from his testimony showing that he and she were the only directors.

Assuming these facts to have been fully established, what are the rights of the parties? Counsel for the plaintiff insist that, though they be accepted at their utmost probative value, they furnish no support for the verdict. They invoke the rule that a deposit belongs to him in whose name it is made, and that by accepting the deposit for plaintiff the defendant could not thereafter pay it to any other person than plaintiff, or apply it for plaintiff's benefit under an express direction. We have no doubt of the propriety of the rule invoked. (*Murphy v. Nett*, 51 Mont. 82, L. R. A. 1915E, 797, 149 Pac. 713; Rev. Codes, sec. 5187.) If we assume for the moment that the plaintiff is a *bona fide* corporation with an effective legal entity, the rule [2] invoked would doubtless apply. The balance disclosed by

the pass-book when accepted as correct, became an account stated between plaintiff and defendant, as counsel contend, and until changed by other dealings between them with reference to it fixed the amount due the plaintiff unless fraud, mistake or error intervened in ascertaining it. (*Martin v. Heinze*, 31 Mont. 68, 77 Pac. 427; *Noyes v. Young*, 32 Mont. 226, 79 Pac. 1063.) Plaintiff had the exclusive right at any time through its authorized officers to make such disposition of the balance as it chose.

Of course, the president of a corporation has no authority to [3] appropriate the assets of the corporation to his own use. He and the other members of the board of directors cannot use their position for the purpose of enriching themselves at the expense of the other stockholders. They occupy a fiduciary relation to the stockholders. This imposes upon them the obligation to serve the purpose of their trust with fidelity, and forbids the doing of any act by them, or any one of them, by which the assets of the corporation are diverted to any use other than such [4] as will serve the purpose of its organization. And when it appears that any one of them has been dealing with the corporation, the burden is at once upon him to show that his dealings have been fair and honest. (*Gerry v. Bismarck Bank*, 19 Mont. 191, 47 Pac. 810; *McConnell v. Combination M. & M. Co.*, 31 Mont. 563, 79 Pac. 248; *Coombs v. Barker*, 31 Mont. 526, 79 Pac. 1; *Kleinschmidt v. American Mining Co., Ltd.*, 49 Mont. 7, 139 Pac. 785.)

The stockholders suffer wrong whether the assets are diverted [5] to the use of one or more of the directors or to that of a stranger. Even so, by authority of the board of directors the defendant had the right, with Hanson's consent, to discharge plaintiff's note. He had been intrusted with the exclusive control of its business affairs from the time of its organization. So far as the plaintiff was concerned, he was possessed of the powers of the board of directors, and could lawfully do anything the board itself could do. At the time this indebtedness was incurred Hanson and his wife held all the stock, and, by the continued acquiescence of the latter permitting him to exercise ✓

all the powers and functions of the corporation, he became for the time the board of directors, with all the powers it possessed. The corporation cannot now question any act of his within the scope of its legal powers. (*Edwards v. Plains L. & W. Co.*, 49 Mont. 535, 143 Pac. 962.) As the corporation itself by formal action might have taken up its note, though not due, so Hanson's act in doing this must be regarded as that of the corporation, just as if he had been authorized in the most formal manner. (*Id.*) On the other hand, upon the assumption that we have made, Hanson had no power to authorize the application of any part of the deposit to the payment of his debt.

Counsel for the defendant insist, however, that the plaintiff [6] is a mere colorable corporation—a shadow organized and maintained by Hanson as a cloak or *alias* under which to conduct his own business. They earnestly contend that the indebtedness was that of Hanson, and that he had the right to devote the deposit to the payment of it, whether evidenced by his own note or that of the ostensible corporation; in other words, Hanson, having used the corporate name merely as a means to serve his personal convenience, cannot insist that he and plaintiff are distinct persons, that he bears toward it a fiduciary relation, and that he could not lawfully apply its assets to discharge his personal debt. This contention, we think, must be sustained. Whatever view may be taken of the *bona fides* of the organization in the beginning, when Trogdon transferred his shares to Hanson the entity of the corporation fell into a condition of abeyance. It had no board of directors nor any secretary. Therefore it had no agency through which it could legally act. The business theretofore conducted in its name by Hanson was thereafter treated by him as his personal business, or at least that of himself and his wife as copartners. The result was that the name of the corporation, except for the purpose of protecting strangers, became in effect the name of Hanson, and the business, so far as he conducted it in the corporate name, was his. When a corporation is in this condition, the public cannot be expected to know of the fact; hence the rule that,

where strangers deal with it, it can be held for all obligations assumed by its officers in its name. Its legal capacity cannot [7] be inquired into collaterally or questioned by a private citizen in a controversy between it and him. This can be done only by the state through its proper officer (Rev. Codes, sec. 3892), and for one of the causes prescribed by the statute (sec. 6944). But this rule does not preclude an examination into the facts to ascertain the identity of the person who uses the name of the corporation for his own purposes and to fix liability for the ostensible corporate acts upon him. In the language of the Court of Appeals of New York in *Seymour v. Spring F. C. Assn.*, 144 N. Y. 333, 26 L. R. A. 859, 39 N. E. 365: "The abstraction of the corporate entity should never be allowed to bar out and pervert the real and obvious truth."

In *Barnes v. Smith*, 48 Mont. 309, 137 Pac. 541, this court said: "There are exceptional cases in which the courts refuse to recognize the corporate entity, as distinguished from the stockholders, if the refusal of such recognition is necessary in order to get at the truth. This statement applies especially to cases in which the corporation is used as a cloak for fraud, or to enable the owner of the stock to evade personal liability or the performance of a public duty. It has application also to cases in which circuitry of action would otherwise be necessary to reach an adjustment of the rights of the parties." In that case the plaintiff had become the owner of all the capital stock of a corporation, but continued its business through the agency of dummies selected to act according to his directions. A debt contracted in the name of the company by the dummies for the payment of which they had become sureties during the course of business was held to be in legal effect the debt of the owner of the stock, so that he could not hold his dummies for the amount of it though he had paid it. This case is not directly in point in its facts, but is authority for the proposition that, whenever it is necessary, the courts will look beneath the particular transaction in order to prevent the perpetration of a

palpable fraud. If in the one case an ostensible debt of the corporation must be deemed to be the debt of the owner of the stock, by parity of reasoning the ostensible debt of the owner of the stock should be regarded, under proper circumstances, as the debt of the corporation. Here Hanson used the credit of himself and the corporation to serve his own purposes. If he is permitted to hide behind the corporate entity to undo what he did in the adjustment of his and its debts, and mulct the defendant in damages besides, he will have been aided in committing a fraud. True, the defendant violated the statute in lending him the amount of money it did and evidenced as it was by the two notes. But he was a willing beneficiary, and since he authorized the defendant to appropriate the deposit, which was in fact his, to the payment of the notes, he stands in no position to say that he violated his trust as president of the corporation in doing this. It is not to the point that Mrs. Hanson's rights were violated. She was merely the agency by which he attempted to preserve the corporate name. Nor is it to the point to say that the brother in Oregon suffered a wrong. In the recapitulation of the evidence above we have assumed as an established fact that he was the owner of shares in excess of 100. In view of Hanson's vague and indefinite explanation of the transaction by which the brother acquired the shares, whereas he could have disclosed fully the facts in connection with it, the fact that the brother never took any interest in the affairs of the corporation, that it is doubtful whether he gave any consideration for the shares held by him, and that Hanson was permitted to conduct the business as theretofore, it is questionable whether this assumption is justified. Be this as it may, we think we are fully justified in the conclusion that his position as stockholder was only nominal, the same as that of Mrs. Hanson. If he in fact became a stockholder, he became such after the debt was contracted and the notes were renewed under the agreement of February 7, 1914, and as an agent of Hanson to serve his purpose. If he did not in fact become a stockholder, the result is the same. The evidence as a whole suggests an

effort on the part of Hanson to use the corporate entity to avoid the result of the payment to the defendant, having concluded, upon afterthought, that he would profit by this course.

If the foregoing conclusion is correct, Hanson's authority to Price to apply the deposit as he did amounted to nothing more nor less than a payment of his personal obligation with moneys belonging to him. His verbal direction to the defendant gave it plenary authority to apply the deposit, and the contention by counsel for plaintiff that defendant must have had authority in writing is without merit.

The same may be said of the contention that the court erred [8, 9] in permitting the defendant to introduce evidence showing that the account had been exhausted. The argument is that the contract relation established between the plaintiff and the defendant by virtue of the deposit evidenced by the pass-book could only have been terminated by a release, payment or accord and satisfaction by the plaintiff, and hence that it was incumbent upon the defendant to plead specially the facts showing that the relation had been thus terminated. Under the allegations of the complaint plaintiff was bound to prove that at the time the checks were presented it had a balance sufficient to meet them. Under its denials the defendant was entitled to show that this was not true, and this it could do by showing that the balance appearing on the pass-book had been exhausted by any appropriation made of it by the plaintiff by other checks that had been paid, or otherwise by the direction of the plaintiff. Any evidence is admissible under a general denial which tends to controvert the allegations of the complaint. This includes evidence of any fact which is inconsistent with, and thus negatives, plaintiff's cause of action.

Hanson was the only witness who testified for plaintiff as to the transaction between him and the defendant. On cross-[10, 11] examination counsel for defendant were permitted to question him as to his relations to plaintiff, the extent of his interest in and control over it, the ownership of the shares of its capital stock, and all other facts tending to show that it was

merely a colorable corporation. In fact, it permitted counsel to draw from the witness facts which related wholly to the defense and about which he had not testified in chief. This was error. (*Shandy v. McDonald*, 38 Mont. 393, 100 Pac. 203; *Pelican v. Mutual Life Ins. Co.*, 44 Mont. 277, 119 Pac. 778.) The evidence was competent, however, and if it had been offered at the proper time and in the regular order, it would have been error to exclude it. The contention now is that the plaintiff should be awarded a new trial solely for the reason that the court permitted a technical violation of the rule of cross-examination. The contention is without merit. It is not pointed out, nor is it apparent, wherein the plaintiff suffered in its substantial rights. The error must be disregarded. (Rev. Codes, sec. 6593.)

Counsel have assigned error upon several rulings of the court in excluding evidence. We have considered the argument made in support of each of them. The rulings were correct.

Though special exceptions were taken to the giving of certain instructions and the refusal to give others, counsel have not argued them in their brief. We therefore do not deem it necessary to notice them.

The judgment and order are affirmed.

Affirmed.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

Rehearing denied April 3, 1917.

STATE EX REL. DUNNE, RELATOR, v. SMITH, RESPONDENT.

(No. 3,977.)

(Submitted February 20, 1917. Decided March 5, 1917.)

[163 Pac. 784.]

*Quo Warranto — Counties — Office and Officers—Vacancies—
Appointment — Constitution — Title to Office — Collateral
Attack.*

County Offices—Vacancies—Appointment—Constitution.

1. The vacancies in county offices referred to in the last clause of section 5, Article XVI, of the state Constitution, the appointees to fill which shall hold until the next succeeding general election, are those occurring after the fixed term has commenced, but before a general election; and no appointment holds good beyond the next succeeding general election, whether the interval between it and the fixed term be great or small.

Same—County Commissioners—Anticipating Vacancy—Void Appointment.

2. An outgoing board of county commissioners may not, by anticipation, fill a vacancy in a county office which will not arise until the incoming one shall take office.

[As to existence of vacancy in office on taking effect of law creating the same, see note in *Ann. Cas.* 1915D, 127.]

Same—Case at Bar.

3. S., the incumbent of the office of county assessor, was re-elected in November, 1916, qualified for the second term, but died before its commencement. C. S. was appointed to fill the vacancy in the unexpired first term of S. On the first Monday in January, 1917—the beginning of S.'s second term, had he lived—the board, whose personnel had changed, appointed D. to fill such latter term. C. S. refused to surrender the office, claiming that under section 5, Article XVI, of the Constitution, she was entitled to hold until the next succeeding general election in 1918. *Held*, on *quo warranto*, that the action of the board of county commissioners was proper, in each instance, and that D. was, and C. S. was not, entitled to the office.

Same—Title to Office—Parties.

4. Title to office cannot be tried in proceedings to which the incumbent is not a party.

Same—Official Acts—Collateral Attack.

5. The acts of an officer done *colore officii* are proof against collateral attack.

Original proceedings in *quo warranto* by the State on the relation of Edward W. Dunne against Carrie G. Smith, to determine title to the office of county assessor of Yellowstone County. Judgment for relator.

Messrs. Johnston & Coleman, for Relator, submitted a brief; *Mr. W. M. Johnston* argued the cause orally.

Mr. O. F. Goddard and *Mr. E. E. Collins*, for Respondent, submitted a brief and argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

Quo warranto by Edward W. Dunne, claiming to be the duly appointed and qualified county assessor of Yellowstone county, against Carrie G. Smith, also asserting a similar claim. The agreed facts are these: At the general election held November 7, 1916, A. P. Smith, then, by previous election, the lawful incumbent of the office of county assessor of Yellowstone county, was elected to succeed himself. He qualified by filing the requisite oath and bond and on December 3, 1916, died. Four days later the board of county commissioners of said county, then composed of Messrs. Sorenson, Todd and Rademaker, appointed Carrie G. Smith to fill the vacancy "for the term ending on the first Monday in January, 1917." Mrs. Smith qualified by filing the requisite oath and bond, her bond reciting that it was executed to assure the faithful performance of her official duties during the term "beginning December 7, 1916, and expiring on the first day of January, 1917"; she entered upon the discharge and ever since has discharged the duties of such office. On the first Monday of January, 1917, which was the first day of that month, the personnel of the board was changed by the succession of Mr. Phelan in place of Mr. Sorenson, and on the following day, the new board being in session, these proceedings were had: "It was moved by Phelan that Edward W. Dunne be appointed county assessor to fill the vacancy beginning the first Monday in January, 1917, and ending the first Monday in January, 1919; Commissioner Todd stated that he did not believe a vacancy now existed in said office of county assessor; Chairman Rademaker then seconded the motion of Commissioner Phelan, and instructed the clerk to poll the board, with the following result: Phelan, aye, Rademaker, aye, Todd, nay."

Thereupon the county clerk gave written notice to Dunne of his appointment to such office for such term. On the same day, January 2, Mrs. Smith filed another instrument as and for her official bond as county assessor "for the term beginning on the first day of January, 1917, and expiring on the sixth day of January, 1919," and on the next day, January 3, she filed her constitutional oath. Mr. Dunne likewise qualified on January 3 by filing his oath and bond, and thereupon made demand for possession of the office; but Mrs. Smith refused, and still refuses, to vacate or surrender the same. Certain facts are also agreed which raise a contention touching the right of F. X. N. Rademaker, one of the two acting commissioners who voted for the appointment of Dunne, to sit as a member of the board, which contention will be noticed later in this opinion. The ultimate question is: To which of these appointees does the office belong? This we shall consider: First, as though no dispute existed concerning Rademaker; and, second, as affected by such dispute.

1. The claim of Mrs. Smith is based upon an appointment [1-3] which by its terms is expressly limited and which according to its terms expired on the first Monday in January, 1917. That fact alone would end this branch of the controversy but for her contention that the limitation is ineffective because, under Article XVI, section 5, of the Constitution, and section 2966 of the Revised Codes, the appointee to fill a vacancy holds as a matter of law until the next succeeding general election. This may be admitted as a possible result of the bare language of these provisions superficially considered; that it cannot be a correct application of them seems clear if we bring to our aid certain very common possibilities. Let this be supposed, for instance: Someone other than the incumbent of a county office is elected to succeed him; the successor so elected files his oath and bond; the incumbent dies after such election, but before the elected and qualified successor is entitled to the possession of the office, and an appointment is made to fill the vacancy thus caused. For how long, regardless of its language, is such ap-

pointment good? Certainly not until the next general election, nor beyond the unexpired portion of the incumbent's term, because by virtue of the same constitutional provision the elected and qualified successor is entitled to the office upon the commencement of the term for which he was elected. For the county officers therein mentioned who have been elected to their positions, the constitutional provision plainly contemplates a fixed term of two years, with a contingent occupancy until their successors are elected and qualified. Any such officer holds beyond his fixed term as against a mere appointee (*State ex rel. Chenoweth v. Acton*, 31 Mont. 37, 77 Pac. 299); but his contingent right to hold over is cut off the moment a duly elected successor has qualified. In the nature of things it can make no difference whether the elected and qualified successor is the same or a different person—the fact of such election and qualification puts an end to the right of the incumbent to hold over after the expiration of his current term. (*People ex rel. Sweet v. Ward*, 107 Cal. 236, 40 Pac. 538.) Suppose again, therefore, that someone other than the incumbent of a county office is elected for the ensuing term, and that he qualifies but dies before the commencement of his term; the incumbent could not, save as *locum tenens* to prevent an interregnum, hold beyond the current term because his successor has been elected and qualified. If in this situation the incumbent should resign before the end of his fixed term, in virtue of what provision or principle could an appointee in his stead possess a greater or longer tenure? By the aid of these and other like examples we are enabled to see that not in all cases can the appointee hold until the next general election, and that a literal construction of the last clause of section 5, Article XVI, of the Constitution cannot be the proper one.

The solution of the matter lies, we think, in the correlation of the last with the other clauses of the section, in holding the vacancies referred to in that clause to be those occurring after the fixed term has commenced, but before a general election, and in realizing its meaning to be that no appointment shall hold

good beyond the next succeeding general election, whether the interval between that event and the end of the fixed term be great or small. (*State ex rel. Rowe v. Kehoe*, 49 Mont. 582, 144 Pac. 162.)

The subject has been illuminated by several California decisions, among which *People ex rel. Sweet v. Ward*, cited above, is particularly interesting. The facts in that case were: That at the general election in November, 1894, William Darby was elected district attorney of San Diego county to succeed M. L. Ward, then the incumbent by previous election. Darby qualified, and on December 15, 1894, died. By the law of California the elective terms of county officers began at noon on the first Monday after the first day of January in each odd-numbered year, and this, in the year 1895, happened to be the seventh day of the month. On January 2, 1895, the board of supervisors, as then constituted, appointed Ward to fill the vacancy caused by Darby's death, and on the same day Ward qualified under the appointment. At 3 o'clock P. M., on January 7, 1895, the board, its personnel having been changed, declared a vacancy to exist in the office of district attorney, and appointed A. H. Sweet to fill it during the term for which Darby had been elected. Sweet qualified, demanded possession and, being refused, brought proceedings to try the title to the office. Ward contended that no vacancy in the office resulted from Darby's death prior to the time Darby was entitled to take possession, because he (Ward) was then entitled to the office, with the right to hold until divested by a duly elected or appointed and qualified successor, or, if there was a vacancy, he was entitled to the office because of his appointment to serve out Darby's term. Disposing of these contentions the court said: "It is not to be questioned but that if Darby had lived, and at noon of the seventh day of January, 1895, had demanded the office of Ward, he would have been entitled to enter it, and Ward's term would thus and then have ceased and determined. But was a demand by Darby necessary to determine Ward's tenure? The answer is found in the language of the statute. Ward,

by section 60 of the Act quoted, and by section 879 of the Political Code, was entitled to hold absolutely until noon of January seventh, and contingently after that date, if no successor had been elected or appointed and qualified. * * * So here, the legislature having in effect provided that Ward's term upon the election and qualification of Darby came to an end at noon of January 7, 1895, a vacancy in law resulted when Darby's death prevented his succession. * * * The election and qualification of Darby as Ward's successor (and not a demand by him for the office) *ipso facto* cut off Ward's contingent term, and limited him to the absolute period; that is, until noon of January 7. * * * The vacancy which occurred having arisen at noon of January 7, it remains to be considered whether the action of the board of supervisors upon January 2 was legal or illegal. * * * The board then undertook to fill, not an existing vacancy, but one soon to exist, * * * one which in the nature of things was certain to arise, though at a future date, and at a time when, in legal contemplation and in fact, a different board would be in control of the county's affairs. Briefly, the act of the board was to make an appointment to take effect, and to fill a vacancy to arise, in the term of its successor. * * * Upon the election and qualification of Darby his right to the office for the term commencing at noon of January 7 vested immediately, and Ward's contingent right to an additional term was cut off. Upon the divestiture of that right by death, it existed in no one, and there was no revivor of Ward's contingent right to an extended term. The power of the board of supervisors in dealing with such matters is drawn from subdivision 21, section 25, of the County Government Act of 1891, and it is limited to the filling of vacancies. That power could properly be exercised only upon an existing vacancy. The board could by its action neither create a vacancy, nor by anticipation fill one, which was to arise *in futuro* during the term of its successor. * * * We conclude, therefore: First, that a vacancy arose in the office of district attorney by reason of the election, qualification and death of Darby; second, that this vacancy

existed at and after noon of the seventh day of January, 1895, and not before; third, that the attempt of the first board of supervisors to fill the vacancy upon January 2 was in excess of its power and void; fourth, that the vacancy was properly filled by the existing board at 3 o'clock P. M. of January 7, 1895."

Again, in *People ex rel. Mattison v. Nye*, 9 Cal. App. 148, 98 Pac. 241, the subject was considered from a slightly different angle, the facts being that at the general election of 1906, one Colgan, state controller by previous election, was re-elected. A few days later he died, and the governor (then J. C. Pardee) appointed Nye "to fill the unexpired term." Nye qualified, took possession, and carried on the work of the office. On Monday the seventh day of January, 1907, Governor Pardee issued a second commission to Nye "for the term prescribed by law, vice self and E. P. Colgan, deceased," and Nye immediately qualified thereunder. On April 29, J. N. Gillett, Pardee's successor as governor, appointed one Mattison to the office, who qualified, demanded possession, and, being refused, brought proceedings. Nye advanced the contention that, under section 8, Article V, of the California Constitution, which provides that vacancies in certain state offices, including that of controller, shall be filled by commission from the governor, which commission "shall expire * * * at the next election by the people," he was entitled to hold under the first appointment until the general election of 1908, or else there was a vacancy on the seventh day of January, 1907, and he was entitled to hold under the second commission. The court, overruling the first and sustaining the second of these alternatives, said: "Two distinct terms are involved in this controversy. Mr. Colgan was serving one term as controller when in November, 1906, he was elected for another term. If the first term did not come to an end, there could be no beginning of the second term. It is impossible to conceive of the beginning of one without the ending of the other. But the term for which he was elected in November, 1906, according to the provisions of the Constitution, began either January 7 or 8, 1907. * * * Therefore * * *

Mr. Nye's right to hold the office under the first commission expired either January 6 or January 7, 1907. It is true that in the interests of the public service, to prevent an interregnum, it was his privilege and his duty to discharge the functions of the office; * * * but he did not thereby acquire any right to a new, fixed and definite term. He became a temporary incumbent, *locum tenens*, by virtue of public necessity, it has been said, until the place could be regularly filled. * * * From the foregoing considerations it clearly follows that at the beginning of the term for which Mr. Colgan was elected in November, 1906, there was in legal contemplation a vacancy in the office of controller." And it was held that since this term began before the second appointment of Mr. Nye, "the latter is now entitled to the office."

So here, we may repeat: Two terms are involved, the term for which Mr. Smith was the incumbent of the office of county assessor of Yellowstone county when he died, and the term for which he was elected in November, 1916. Only the first of these became vacant when he died, and it alone could be filled by the board which appointed Mrs. Smith; the second did not become and could not be vacant until the first Monday in January, 1917, at which time a new board came into office. On that board was cast the duty to fill the vacancy by appointment, and this it did by the selection of Mr. Dunne. He therefore is entitled to hold until the next general election, unless it must be held that his appointment, depending as it did on the vote of Mr. Rademaker, was invalid on that account.

2. It is a fact established by the agreed statement that at the time Dunne was appointed, Rademaker was acting as a member of the board of county commissioners of Yellowstone county. He had theretofore and for some months been acting without challenge or question pursuant to an appointment; but he was then claiming the office by virtue of election in November, 1916, to fill the unexpired term of W. C. Renwick, who had been elected in 1914, and who had resigned. The contention is that Rademaker is a mere intruder, whose acts are void, because he

failed to qualify in time under the appointment, and his selection by the people was invalid because no notice of any special election to fill the unexpired term of Mr. Renwick was ever given. Upon the face of the record the claim of Mr. Rademaker might possibly be upheld, under the decision of this court in *State ex rel. Patterson v. Lentz*, 50 Mont. 322, 146 Pac. 932; but be [4, 5] that as it may, his title to the office of commissioner cannot be tried in a proceeding to which he is not a party. (*State ex rel. Buckner v. Mayor of Butte*, 41 Mont. 377, 109 Pac. 710.) He was at least a *de facto* commissioner, and his acts *colore officii* are proof against collateral attack.

It is therefore adjudged that the relator, Edward W. Dunne, is, and since January 3, 1917, has been, entitled to the office of county assessor of Yellowstone county, Montana, and he is entitled to recover his costs herein incurred; that the respondent, Carrie G. Smith, is not entitled to said office; that she ought to be, and is, ousted therefrom and charged with the costs of this proceeding.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

CASES DETERMINED
IN THE
SUPREME COURT
AT THE
MARCH TERM, 1917.

THE HON. THEODORE BRANTLY, Chief Justice.

THE HON. SYDNEY SANNER,
THE HON. WILLIAM L. HOLLOWAY, } **Associate Justices.**

STATE EX REL. PAYNE, RELATOR, v. DISTRICT COURT
ET AL., RESPONDENTS.

(No. 3,921.)

(Submitted February 10, 1917. Decided March 7, 1917.)

[165 Pac. 294.]

*Mandamus—Officers — County Commissioners — Removal—Col-
lecting Illegal Fees—Accusation—Sufficiency—Constitution.*

Officers—Removal—"Illegal Fees."

1. *Held*, on *mandamus*, that the word "fees," as used in section 9006, Revised Codes, providing for the removal of public officers for collecting "illegal fees," is broad enough to comprehend both *per diem* and expenses. (See, also, *State v. Story*, *post*, p. 573.)

[As to exacting illegal fees for compensation as misconduct for which public officer may be removed, see note in *Ann. Cas.* 1912C, 147.]

Same—Accusation—Contents.

2. To constitute the offense of collecting illegal fees, the charge must state that the accused is the incumbent of a public office, that, acting by virtue of his office, he collected certain fees, and that the fees collected were illegal, *i. e.*, not authorized by law.

Same—What are—"Illegal Fees."

3. Fees are illegal within the meaning of section 9006, Revised Codes, if collected for services never rendered, or never intended to be rendered; if collected for services rendered for which no compensation is allowed by law; or if collected for services at a rate higher than the law allows therefor.

Same—Accusation—Sufficiency.

4. An accusation charging an officer with collecting illegal fees may be prepared by a layman, and will be held sufficient if it clearly and distinctly sets forth the facts constituting the offense in ordinary and concise language that a person of common understanding may know what is intended.

Same.

5. An accusation of the character above mentioned is sufficient if it shows upon its face that the fees collected were illegal; a statement that they were illegal, or wherein they were illegal, not being required.

Same—Nature of Proceeding—Constitution.

6. The words "criminal prosecutions" as used in the Constitution refer to prosecutions for offenses which were crimes at the common law and are crimes under the statute.

Same—Nature of Proceeding.

7. A proceeding brought for the removal of a public officer under section 9006, Revised Codes, is not a criminal action in the sense that it must be brought in the name of the state, that the public prosecutor must conduct it, or a jury called to try the accused.

Mandamus—When Writ Available.

8. Where the district court refuses to proceed with the trial of a proceeding such as referred to above, because of an erroneous view of a preliminary question of law, *mandamus* lies to get the machinery of the law in motion.

Original application for writ of mandate by the State on the relation of W. W. Payne, directed to the District Court of the Fifth Judicial District, in and for the County of Madison, and Jos. C. Smith, a Judge thereof. Writ issued.

Mr. Jas. T. Shea, for Relator, argued the cause orally.

Mr. M. M. Duncan, for Respondents, submitted oral argument.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In June, 1916, accusation in writing verified by W. W. Payne was presented to the district court of the fifth judicial district charging Bert G. Paige, a county commissioner of Madison county, with official misconduct. The accusation is in three counts. By the first it was intended to charge the collection of illegal fees, and by the second and third that Paige was person-

ally and financially interested in certain property which he caused to be purchased by the county. A citation was issued, and the accused appeared and denied the material allegations of the accusation. When the proceeding was brought to trial the court declined to try in a summary manner the issues framed upon the second or third count, and when it was sought to prove the allegations of the first count, an objection to the introduction of any evidence was sustained and the proceeding dismissed. The accusing party then secured from this court an alternative writ of mandate directed to the lower court requiring it to proceed with the hearing or show cause why it refused to do so. Upon the return a motion to quash was interposed and the matter submitted.

The proceeding was instituted under section 9006, Revised Codes. That section does not comprehend such official misconduct as is charged in either the second or third count of the accusation, and for this reason the court correctly refused to try the issues presented upon either of those two counts.

The first count charges that the accused collected illegal fees from Madison county for alleged services rendered by him in his office as county commissioner, in that he presented to and collected from the county his bill for \$249 for items, among which are a large number every one of which it is alleged is illegal. Copied in the accusation is a list of these alleged illegal items. A part of that list, sufficient to illustrate the whole, is as follows:

“1915.

June 13, 1 day with Grant, Waterloo	\$8.00
expense on same day	4.00
15, 1 day Big Hole road French Ranch.....	8.00
and ex.....	3.50
17, ½ day Wisconsin Creek lower road.....	4.00
ex.....	2.00
18, ½ day to road crew with extras.....	4.00
ex.....	2.50

“1915.

June 21, 1 day. See about right of way Cox <i>et al.</i>	8.00
ex.....	5.00
24, ¾ day Point Rocks, Mailey road.....	6.00
ex.....	4.00
July 2, ½ day to road crew with extras.....	4.00
ex.....	2.00
7, ¾ day Exchange, help road crew.....	6.00
ex.....	3.00”

There is a separate charge relating to an item of \$12, which it is alleged was collected by the accused as and for expenses incurred by him in connection with his attendance upon a meeting of the board.

1. It is contended that this first count does not state facts sufficient to constitute an offense cognizable under section 9006:

(a) Because the items of expense are not fees within the [1] meaning of the word as used in that section. The term “fees” used in the Codes is somewhat elastic. Section 3172, Revised Codes, provides that “the county surveyor is entitled to receive and collect for his own use the following fees: * * * Expense of chainmen and markers,” *etc.* Section 3173: “The coroner is entitled to receive and collect for his own use the following fees: * * * For each mile actually traveled in the performance of any duty, ten cents.” We think the term “fees” used in section 9006 is sufficiently broad to comprehend both *per diem* and expenses. (*Burrows v. Balfour*, 39 Or. 488, 65 Pac. 1062; 19 Cyc. 462.)

(b) Because it is not alleged that the services for which the charges were made were not rendered, or, if rendered, that the fees received are not authorized by law. Section 9006 is directed against the incumbent of an office who makes use of his official position as a medium for securing fees to which he is not entitled. (*Smith v. Ling*, 68 Cal. 324, 9 Pac. 171.) The gist of the offense condemned is the collection of illegal fees by [2] virtue of official position. To constitute the offense, therefore, it must be made to appear (a) that the accused is the in-

cumbent of a public office, (b) that, acting by virtue of his office, he collected certain fees, and (c) that the fees collected were illegal; that is, not authorized by law under the circumstances [3] of the particular case. If the fees were collected for services never rendered, or never intended to be rendered, they would be illegal. (*Rankin v. Jauman*, 4 Idaho, 53, 36 Pac. 502.) If they were collected for services rendered but for which no compensation is allowed, they would be illegal. (*State ex rel. Rowe v. District Court*, 44 Mont. 318, 27 Ann. Cas. 396, 119 Pac. 1103.) If the accused collected for services rendered more than the law allows for such services, he collected illegal fees within the meaning of section 9006. (*Leggatt v. Prideaux*, 16 Mont. 205, 50 Am. St. Rep. 498, 40 Pac. 377.)

We agree with counsel for the accused that it does not aid the accusation to say that every item in the list above is illegal. These fees are legal or illegal depending upon whether they are, or are not, authorized by law. A county commissioner can lawfully collect for services performed in virtue of his office only such fees or other compensation as the law specifically authorizes. The law authorizes *per diem* and mileage for attending the meeting of the board (sec. 2893, Rev. Codes), and *per diem* and expenses while inspecting contract construction work on a highway or bridge, under a proper order of the board. (Laws 1915, p. 319.)

The statute does not prescribe rules of pleading. It does [4] contemplate that the accusation may be prepared by a layman. In any event, it is sufficient if it clearly and distinctly sets forth the facts constituting the offense, in ordinary and concise language and in such manner that a person of common understanding may know what was intended. (*Woods v. Var-num*, 85 Cal. 639, 24 Pac. 843.)

If the items for which the accused charged these fees show [5] on the face of them that they are not authorized by law, there is no necessity to characterize them or attempt to show wherein they are illegal. They show for themselves. We think the accusation, in the first count, is sufficient to charge the collec-

tion of illegal fees. In effect it alleges that the accused, acting in his official capacity as county commissioner of Madison county, spent one day seeing about a right of way for which he charged and collected from the county \$8 and \$5 additional for expenses, *etc.* This item particularly is not comprehended within any provisions of the law authorizing fees or other compensation to a member of the board of county commissioners for services rendered in his office, and is therefore *prima facie* illegal. There are others of the same general character, and still others which are not *prima facie* illegal but may be illegal or not, depending upon circumstances which are not disclosed by the accusation. Since the first count charges the collection of certain fees which on the face of them appear illegal, it is sufficient to withstand an objection to the introduction of evidence.

2. It is next contended that section 9006 is unconstitutional, in that it attempts to authorize a prosecution for crime by a [6, 7] private individual and the trial and conviction of the accused upon a summary hearing without a jury. Section 8, Article III, of the Constitution provides that all criminal actions in the district court, except those on appeal, shall be prosecuted by information or indictment. Section 16 of the Bill of Rights provides: "In all criminal prosecutions the accused shall have the right to * * * a speedy public trial by an impartial jury." Section 27, Article VIII, of the Constitution provides that all prosecutions shall be conducted in the name of the state. If the proceeding authorized by section 9006 is a criminal prosecution, within the meaning of those terms as they are used in the Constitution, then it follows as of course that this section is invalid.

"Criminal prosecutions," as those terms are employed in the Constitution, refer to prosecutions for offenses which were crimes at common law and doubtless to statutory offenses. (*McInerney v. Denver*, 17 Colo. 302, 29 Pac. 516; 6 Am. & Eng. Ency. Law, 2d ed., p. 974; 6 R. C. L., p. 458.) Section 17, Article V, of the Constitution provides for the removal of cer-

tain officers by impeachment, and section 18 of the same Article declares that officers not liable to impeachment are subject to removal for misconduct or malfeasance in office, in such manner as may be provided by law. Recalling that our Constitution is a limitation and not a grant of power, it will be seen at once that the provisions of section 18 above added nothing to the power which the legislature would have had in the absence of such provisions. In other words, the legislature was left entirely free to enact such statutes as it might see fit providing for the removal of officers other than those enumerated in section 17.

Proceedings for the removal of a public officer do not necessarily partake of the nature of a criminal prosecution. Indeed, the power to remove an unfaithful or negligent public official is not essentially a judicial power. Under our Constitution, its exercise is left to the legislature itself or to such other authority as the legislature may designate. This is the plain import of section 18 above, and is the general rule in the absence of any constitutional declaration upon the subject. (29 Cyc. 1370; *State v. Doherty*, 25 La. Ann. 119, 13 Am. Rep. 131; *Territory v. Cox*, 6 Dak. 501.) The power may be conferred upon the governor (*Cameron v. Parker*, 2 Okl. 277, 38 Pac. 14) or upon a board. (*Donahue v. Will County*, 100 Ill. 94.) It may be conferred upon a court of general or limited jurisdiction to be exercised in the mode provided by law, and consequently, if the legislature sees fit to require a jury trial, a jury trial must be had; but if it sees fit to provide for a summary hearing without a jury, no constitutional right of the accused is infringed. (*Rankin v. Jauman*, above.)

Many of the states have statutes similar to our section 9006, and they have been upheld uniformly. The proceeding need not be in the name of the state, and an accusation in the form of an affidavit meets all the requirements of the statute. (*Wood v. Varnum*, above.) In *State ex rel. Rowe v. District Court*, above, this court held that the proceeding authorized by section 9006 is *quasi-criminal* in character, but that the accused

is not entitled to a jury trial. (Page 327.) Doubtless it would be more nearly accurate to say that the proceeding is a special statutory one and avoid any attempt at arbitrary classification. It is one clearly authorized by law in the exercise by the legislature of its plenary power. It is initiated by a private individual. It need not be in the name of the state. The accused is not entitled to a trial by jury, and it is not a criminal action in the sense that the public prosecutor must conduct the proceeding.

There are expressions by way of *dicta* to be found in *State ex rel. McGrade v. District Court*, 52 Mont. 371, 157 Pac. 1157, which indicate a contrary view; but on examination it will be found that the particular questions to which such expressions are directed were not necessarily involved in the decision of that case. The only question there presented was whether an attorney called upon to conduct such a proceeding is entitled as of right to compensation from the county for his services, and it was held that he is not, because the statutes do not provide for such compensation.

3. Is *mandamus* an available remedy? Section 9006 makes no provision for an appeal or other means of review. The trial court refused to proceed because of an erroneous view of a preliminary question of law, and in such case *mandamus* will lie to get the machinery of the law in motion. (*State ex rel. Arthurs v. Board of County Commrs.*, 44 Mont. 51, 118 Pac. 804.)

It is ordered that a peremptory writ of mandate issue, directed to the district court, requiring it to reinstate the proceeding and try the issue presented upon the first count of the accusation.

Writ issued.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER
concur.

Rehearing denied May 28, 1917.

STATE EX REL. WOODWARD ET AL., RELATORS, v. DISTRICT COURT ET AL., RESPONDENTS.

(No. 3,990.)

(Submitted February 20, 1917. Decided March 13, 1917.)

[163 Pac. 1149.]

Mandamus—Order Granting Change of Venue—Impropriety of Remedy.

1. An order granting a motion for change of venue on the ground of residence is a judicial act, which will not be set aside by *mandamus*.

Mandamus by the State, on the relation of John Woodward and others, against the District Court of the Fifth Judicial District, in and for the County of Madison, and Honorable Wm. A. Clark, a Judge thereof. Dismissed.

Mr. M. M. Duncan and *Messrs. Walsh, Nolan & Scallon*, for Relators, submitted a brief; *Mr. C. B. Nolan* argued the cause orally.

Mr. H. B. Duff, *Mr. C. W. Robison* and *Mr. Geo. M. Melton*, for Respondents, submitted a brief; *Mr. Duff* and *Mr. Melton* argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Mandamus. On November 17, 1916, John Woodward, Lester Woodward and Roy Woodward, as copartners, brought an action in the district court of Madison county against George W. Melton and N. E. Foster. The complaint states two causes of action, one for damages for trespass upon land situate in Madison county, and the other for damages to personal property while the same was in Madison county. The defendants both reside in Beaverhead county and were served with summons there. On their appearance in the action the defendants filed an affidavit of merits and a motion for the transfer of the cause to Beaverhead county for trial. The motion was sustained and the cause transferred. Thereupon application was made to this court for a writ of *mandamus* directing the district court and

Honorable W. A. Clark, the judge presiding, to vacate the order and retain the action for trial in Madison county. An alternative writ having been issued and served, defendants moved to set aside and dismiss the proceeding on the ground that *mandamus* is not the proper remedy.

In *State ex rel. Independent Pub. Co. v. Smith*, 23 Mont. 329, 58 Pac. 867, this court held that an order granting or refusing [1] to grant a motion for a change of venue on the ground of residence is a judicial act, and that it will not be set aside by *mandamus*. That case is conclusive of this. (See, also, *State ex rel. King v. District Court*, 24 Mont. 494, 62 Pac. 820; *State ex rel. Dempsey v. District Court*, 24 Mont. 566, 63 Pac. 389; *State ex rel. Mont. C. Ry. Co. v. District Court*, 32 Mont. 37, 79 Pac. 546; *State ex rel. Rowe v. District Court*, 44 Mont. 318, Ann. Cas. 1913B, 396, 119 Pac. 1103.)

The alternative writ is vacated and the application dismissed.

Dismissed.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

EDWARDS, APPELLANT, v. COUNTY OF LEWIS AND
CLARK, RESPONDENT.

(No. 3,805.)

(Submitted January 23, 1917. Decided March 13, 1917.)

[165 Pac. 297.]

*Counties—Refunding Bonds—Power to Issue—Constitution—
Statutes.*

Constitution—Nature of Instrument.

1. The state Constitution is not a grant but a limitation of powers.

Counties—Powers—Constitution.

2. A county is a subdivision of the state for governmental purposes, and as such is subject to legislation, regulation and control, except in so far as the Constitution has placed limitations upon the law-making power.

Same.

3. Unless a county can find authority in the statutes for a contemplated act, it is powerless to carry it into execution.

[As to counties as municipal corporations, see note in Ann. Cas. 1914C, 968.]

Same—Issuance of Refunding Bonds—Powers.

4. The authority of the board of county commissioners to issue refunding bonds in excess of \$10,000 must be determined by reference to section 2905, Revised Codes, as amended (Laws 1915, p. 47), and section 2933.

Same—Refunding Bonds—Issuance—Electors' Vote Necessary, When.

5. *Held*, under sections 2905 and 2933, above, that the board of county commissioners could not issue bonds, in excess of \$10,000, for the purpose of refunding outstanding road warrants, without having first obtained the approval of the electors of the county.

Same—Borrowing Money—Creating Indebtedness—Constitution—Statutes.

6. *Held*, that the words "incur indebtedness or liability," used in section 5, Article XIII, Constitution, and "borrow money," found in section 2933, Revised Codes, referring to the power of the county to do either, are not synonymous; the former having to do with the creation of new indebtedness, while the latter deals with borrowing money through the instrumentality of issuing bonds for any of the purposes mentioned in the Title of which the section forms a part.

Appeal from District Court, Lewis and Clark County; R. Lee Word, Judge.

ACTION by Frank J. Edwards to enjoin the county of Lewis and Clark from issuing certain refunding bonds. Judgment for defendant. Plaintiff appealed. Reversed and remanded.

Mr. Edward Horsky, for Appellant, submitted a brief and argued the cause orally.

Counties are merely political subdivisions of the state, and are purely auxiliaries of the state. They are clearly not municipal corporations, are only *quasi* corporations, merely governmental agencies, and do not possess the local legislation and control which are the distinguished characteristics of a municipal corporation. (*Hersey v. Neilson*, 47 Mont. 132, 140-143, Ann. Cas. 1914C, 963, 131 Pac. 30.) They have only such powers as are clearly provided by law or are necessarily implied by those expressed. (*Independent Pub. Co. v. Lewis and Clark Co.*, 30 Mont. 83, 75 Pac. 860; 7 R. C. L. 925, sec. 5; *Burnett v. Maloney*, 97 Tenn. 697, 34 L. R. A. 541, 37 S. W. 689.) "A county is

the lowest order of corporate existence." (1 Dillon on Municipal Corporations, 23.) By reason of the above features, "counties are held to a much greater degree of strictness than cities." (*Burnett v. Maloney*, 97 Tenn. 697, 34 L. R. A. 541, 57 S. W. 689.) "And so when the legislature of a state has prescribed the specific mode in which a county shall proceed in a particular matter, the legislative direction must be followed." (7 R. C. L. 927; *State v. Newton County*, 165 Ind. 262, 6 Ann. Cas. 468, 74 N. E. 1091; *State v. Goldthait*, 172 Ind. 210, 19 Ann. Cas. 737, 87 N. E. 133; *Henry County v. Citizens' Bank*, 208 Mo. 209, 14 L. R. A. (n. s.) 1052, 106 S. W. 622.)

"If in the issue of the bonds, or the issuance of the indebtedness generally, there is any substantial departure from constitutional and statutory authority by any subordinate officials, boards, or bodies, the departure invalidates the indebtedness. It is no answer to say that the departure was for the best interests of the community; subordinate officers have no concern except to keep to the terms of their commissions." (Gray's Limitation on Taxing and Debt Power, sec. 2126; *Sutro v. Pettit*, 74 Cal. 332, 5 Am. St. Rep. 442, 16 Pac. 7; *Lytle v. Lansing*, 147 U. S. 59, 37 L. Ed. 78, 13 Sup. Ct. Rep. 254; *McClure v. Oxford*, 94 U. S. 429, 24 L. Ed. 129; *Bates County v. Winters*, 97 U. S. 83, 24 L. Ed. 933; *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. Ed. 138; *Merrill v. Monticello*, 138 U. S. 673, 34 L. Ed. 1069, 11 Sup. Ct. Rep. 441.)

An Act which exempts property in municipalities from a county road tax is valid, since they are made separate districts and compelled to maintain their own streets and alleys. (*Miller v. County of Kern*, 137 Cal. 516, 70 Pac. 549.) The meaning of the constitutional requirement that the tax shall be uniform is, that each tax must be uniform through the taxing district, a state tax through the state, a county tax through the county, a district tax through the district, etc. (*City of East Portland v. Multnomah County*, 6 Or. 62; *Cooper v. Ash*, 76 Ill. 11.) "Where the legislature has the power to make the territory out-

side the city a separate district, and has done so, the rule of uniformity does not prevent—and indeed requires—that the inhabitants of the city should not be obliged to pay county road taxes.” (Gray’s Limitation, *etc.*, *supra*, sec. 528, n. 84; *Miller v. County of Kern*, 137 Cal. 516, 70 Pac. 549; *Cooper v. Ash*, 76 Ill. 11; *City of East Portland v. County of Multnomah*, 6 Or. 62; *Multnomah County v. Sliker*, 10 Or. 65; *Oregon City v. Moore*, 30 Or. 215, 46 Pac. 1017, 47 Pac. 851.)

Mr. J. B. Poindexter, Attorney General, and *Mr. John H. Alvord*, Assistant Attorney General, for Respondent, submitted a brief; *Mr. Frank Woody*, Assistant Attorney General, argued the cause orally.

The inhabitants of cities do not by their act of incorporation lose their character as members of the general public or residents of the county in which their city is situated; nor does their property lose its status as property within the county, subject to county burdens. They are still members of the body corporate, known as the county, exercising all of the privileges to which that status entitles them, and laboring under all the burdens which it entails. Hence, property within municipal corporations being within the territorial limits of the authority levying taxes must bear its portion of the public need, to the same extent that it is charged with the support of the state or county government in other particulars. (*O’Kane v. Treat*, 25 Ill. 557; *Love v. Town of Preston*, 112 Minn. 459, 128 N. W. 673; *Alexander v. McInnis*, 129 Minn. 165, 151 N. W. 899; *Board Commrs. Gunnison Co. v. Owen*, 7 Colo. 467, 4 Pac. 795.) Nor do we think the argument advanced by some cases and suggested by the court in *Board Commrs. Gunnison Co. v. Owen*, *supra*, that because cities levy taxes for the support of streets and alleys, they should therefore be exempted from general road taxes, is tenable.

The issuing of bonds for the purpose of funding existing indebtedness is not a “borrowing of money.” (*City of Galena v. Corwith*, 48 Ill. 423, 95 Am. Dec. 557; *City of Huron v. Second Ward Sav. Bank*, 86 Fed. 272, 30 C. C. A. 38.) The borrowing

of money and reception is a loan, and implies that it will be repaid. (*Palmer v. City of Albuquerque*, 19 N. M. 285, L. R. A. 1915A, 1106, 142 Pac. 929.) "To contract a debt by borrowing or otherwise and to give a bond or obligation therefor which may circulate in the market as a negotiable security free from any equities or defenses that may be set up by the maker of it, are, it is said, in their nature, and legal effect, different transactions." (2 Dillon on Municipal Corporations, p. 1330.) The borrowing of money and issuing bonds as security therefor, and the issuing of bonds for the purpose of funding an existing indebtedness are entirely different transactions. (*Merrill v. Monticello*, 138 U. S. 673, 34 L. Ed. 1069, 11 Sup. Ct. Rep. 441.) The issuing of funding bonds in lieu of a valid pre-existing indebtedness neither creates a debt nor increases the debt of the municipality issuing them. (*In re Application of State to Issue Bonds*, 33 Okl. 797, 127 Pac. 1065; *Board of Co. Commrs. v. Standley*, 24 Colo. 1, 49 Pac. 23.) If, therefore, the issuing of funding bonds neither increases the debt nor creates a new debt, there is no borrowing of money, as a borrowing means a loan by the party furnishing the money, and a loan implies repayment of the money loaned, a debt thereby being created. Generally as to the effect of issuing refunding bonds, see: *Board of Co. Commrs. v. Rollins*, 9 Wyo. 281, 62 Pac. 351; *Board of Co. Commrs. v. Aetna Life Ins. Co.*, 90 Fed. 222, 32 C. C. A. 585; *Brenham v. German American Bank*, 144 U. S. 173, 36 L. Ed. 390, 12 Sup. Ct. Rep. 559; note to *Hagan v. Co. Commrs.*, 37 L. R. A. (n. s.) 1058. The case of *City of Poughkeepsie v. Quintard*, 136 N. Y. 275, 32 N. E. 764, has been cited with approval in the following cases: *National Life Ins. Co. v. Montpelier*, 13 S. D. 37, 79 Am. St. Rep. 876, 48 L. R. A. 785, 82 N. W. 78; *Barnum v. Board of Supervisors*, 137 N. Y. 179, 33 N. E. 162. In the case of *City of Poughkeepsie v. Quintard*, *supra*, the sole question presented to the court was whether the issuing of refunding bonds was a borrowing of money. There the statute provided two methods of refunding the existing indebtedness: one by a sale of the bonds applying the proceeds to the retirement of the

old bonds; the other by an exchange of the new bonds for the old. The purchaser refused to take the new bonds, claiming that it was a borrowing of money within the prohibition of the city charter; the court held that as no new debt was created and no old debt increased, it was not a borrowing of money, as the borrowing of money would mean the creation of a new debt or increasing of an old one.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In October, 1915, Lewis and Clark county had outstanding registered warrants against its several funds, aggregating in amount \$100,000. Of this amount \$32,077.82 represented road warrants issued for work done during 1914 and 1915 prior to June 14, 1915, on the public highways outside of the corporate limits of the city of Helena—the only incorporated city in the county. The board of county commissioners proposed to retire all of this warrant indebtedness by issuing and selling coupon bonds of the county to the like amount without having submitted the question to a vote of the electors, and plaintiff, a resident taxpayer within the city of Helena, instituted this proceeding to enjoin the issue of bonds to the extent of the \$32,077.82 represented by the road warrants. The cause was submitted upon an agreed statement of facts. The trial court found for the defendant, and plaintiff appealed from the judgment which denied him any relief.

It is claimed by appellant, and conceded by respondent, that the property of appellant situated within the corporate limits of the city of Helena is not liable to taxation to pay the road warrants. It is conceded by both parties, as it must be, that if county bonds are issued to retire these warrants, such bonds will evidence an indebtedness of the entire county, and all taxable property of the county, including plaintiff's property situated within the city of Helena, will be liable to taxation to pay these bonds and the interest thereon. It is the contention of appellant that his property cannot be subjected to taxation to

discharge this indebtedness, by the mere subterfuge of changing the form of the evidence of the indebtedness without his consent, and that the county cannot issue refunding bonds without having the question submitted to and approved by a vote of the electors affected.

To justify the board in seeking to issue these bonds without consulting the electors affected, recourse is had to section 8, Article XII, of the Constitution, and section 2905, Revised Codes, as amended by an Act approved February 26, 1915 (Laws 1915, p. 47). The section of the Constitution referred to provides: "Private property shall not be taken or sold for the corporate debts of public corporations, but the legislative assembly may provide by law for the funding thereof, and shall provide by law for the payment thereof, including all funded debts and obligations, by assessment and taxation of all private property not exempt from taxation within the limits of the territory over which such corporations respectively have authority."

Our Constitution is not a grant, but a limitation of power. [1] Section 8, Article XII above, means nothing more than that the legislature is prohibited from enacting any statute under which private property may be taken to pay the debts of a public corporation, such as a county or city. Aside from this limitation the legislature was left free to enact such measures as it deemed best touching the subject matter under consideration. If it failed to act at all, there is no power other than public opinion which can coerce it into activity. The provision of the Constitution is addressed to the legislature, not to the board of county commissioners, and justification for the board's action must be found in the statutes, if such action can be justified at all.

A county is but a political subdivision of the state for govern- [2] mental purposes, and as such is at all times subject to legislative regulation and control, except in so far as the Constitution has placed limitations upon the law-making power. (*Hersey v. Neilson*, 47 Mont. 132, 131 Pac. 30.) Within those limitations the legislature may circumscribe or extend the powers to be exer-

[3] cised by a county, as it sees fit. The statutes constitute the charter of a county's power, and to them it must look for the evidence of any authority sought to be exercised. (7 R. C. L. 936.) The only statute upon which respondent relies, and the only one which furnishes even a semblance of justification, is section 2905, Revised Codes as amended, above. That section provides: "The board of county commissioners of any county is hereby vested with power and authority to issue and negotiate on the credit of the county, coupon bonds to an amount sufficient to enable the county to redeem all legal outstanding bonds, warrants or orders; or for the purpose of necessary public building sites and for the construction of necessary public buildings, public highways," etc.

In the days of the territory many general and special statutes were enacted to enable counties to borrow money, and to refund their outstanding indebtedness. A limit to the amount of indebtedness which might be incurred was always set, and before bonds could be issued for certain specified purposes the consent of the electors was necessary. Section 786, Fifth Division, Compiled Statutes 1887, authorized the county commissioners of any county to issue county bonds to redeem outstanding warrants or orders. Subdivision 4 of section 756 clothed the board with authority to borrow money upon the credit of the county in a sum sufficient to erect county buildings or to supply a deficit in the county revenues; but section 795 required that the question of borrowing money for either purpose mentioned in subdivision 4 above must first be submitted to a vote of the electors of the county. By an Act approved March 4, 1891, section 795 was amended to read as follows: "The board of county commissioners of any county may, when in its judgment it is advisable for the county to incur indebtedness or liability for any single purpose in an amount exceeding ten thousand dollars (\$10,000), submit the question to the qualified electors of the county"; and section 808 was amended so as to authorize the issuance of refunding bonds and, upon a favorable vote of the electors, bonds for other purposes. (Laws 1891, p. 226.) In *Hotchkiss v. Marion*, 12

Mont. 218, 29 Pac. 821, it was held that under those statutes the question of issuing refunding bonds need not be submitted to a vote of the electors. This was the law when the Codes were adopted in 1895.

Title II, Part IV, of the Political Code, dealt with the subject: "The Government of Counties." Section 4240 of that Title gave to the board of county commissioners authority to issue on the credit of the county coupon bonds to an amount sufficient to enable it to redeem all legal outstanding bonds, warrants or orders, *etc.* Section 4270 of the same Title declared that the board of county commissioners must not borrow money for any of the purposes mentioned *in this Title* or for any single purpose, to an amount exceeding \$10,000 without an approval of a majority of the electors of the county. By an Act approved February 27, 1905, section 4240 above was amended to include other purposes for which bonds might be issued, and as thus amended that section became section 2905, Revised Codes, and section 4270, without amendment became section 2933, Revised Codes. By the Act of February 26, 1915, section 2905 was amended to further extend the scope of the purposes for which bonds may be issued. Section 2933 has not been changed since it was enacted in 1895 or re-enacted in 1907. The amendment to section 2905 did not alter in any respect the provision authorizing the county commissioners to issue bonds for refunding or retiring outstanding indebtedness, and under the rule of construction provided by the Codes (sec. 119, Rev. Codes), the portion of section 2905 relating to that subject is to be considered as having been the law from the time when it was first enacted.

We are, then, to determine the authority of the board to issue [4] refunding bonds, by reference to section 2905 and section 2933, Revised Codes. The two sections are parts of the same legislative enactment, treat of the same subject matter, and are to be construed together. The first contains a general grant of power—the power to issue county bonds for refunding and other enumerated purposes. The latter specifies the conditions under

which the power granted may be exercised if the amount of the loan is to exceed \$10,000.

The language of section 2933 cannot be misunderstood: "The [5] board of county commissioners must not borrow money for any of the purposes mentioned in this Title or for any single purpose to an amount exceeding ten thousand dollars without the approval of a majority of the electors of the county, and without first having submitted the question of a loan to a vote of such electors." "The purposes mentioned *in this Title*" include all the purposes enumerated in section 2905, for both sections are parts of the same Title. But we are asked to construe this phrase in the light of its historical antecedents—in other words, to declare that the language quoted above does not mean what it says, but was intended to comprehend only the limited number of subjects mentioned in subdivision 4 of section 756, Fifth Division, Compiled Statutes of 1887. This we cannot do. The language is altogether different from that employed in the territorial statute, and in reviewing the history of the Act we cannot close our eyes to the fact that after this court had interpreted the former provisions, in *Hotchkiss v. Marion*, the legislature deliberately saw fit to make the radical change in phraseology, thereby furnishing the very best evidence that it was the intention to establish a rule different from the one announced in that case. The language, "for any of the purposes mentioned in this Title," is as comprehensive as it can be made. The commissioners cannot borrow money to refund outstanding indebtedness exceeding ten thousand dollars, by the issuance of bonds or otherwise, without having first obtained the approval of the electors of the county.

If the commissioners issue and sell these bonds, will they thereby borrow money within the meaning of section 2933 above? We think counsel for respondent have confused the ideas expressed in section 5, Article XIII, of the Constitution, and section 2933. The Constitution declares: "No county shall incur any indebtedness or liability for any single purpose to an amount exceeding ten thousand dollars (\$10,000) without the approval

of a majority of the electors thereof, voting at an election to be provided by law." In *Hotchkiss v. Marion* above, and in *Palmer v. City of Helena*, 19 Mont. 61, 47 Pac. 209, it was held that the issuance of refunding bonds merely changed the form of the evidence of pre-existing indebtedness and did not involve the creation of any new indebtedness within the meaning of the constitutional provision above. That inhibition of the Constitution is directed to the legislature. Our legislature is one of inherent, not of delegated, powers, and the restraint laid upon the lawmakers in that instance does not operate to prevent them from imposing upon the counties further limitations in the management of county finances. Acting upon the authority reserved to it, the legislature has provided that a county shall not borrow money for any of the purposes mentioned in section 2905, to an amount exceeding ten thousand dollars, without the consent of the electors who must bear the burden of providing the funds for repaying the loan.

The terms "incur indebtedness or liability," as used in the [6] Constitution, are not synonymous with the term "borrow money," used in section 2933. (7 R. C. L. 944-951.) It is apparent to anyone that the indebtedness represented by the road warrants will not be discharged by issuing bonds and from the proceeds paying off the warrants and that no new indebtedness will be incurred. The indebtedness will remain but the evidence of it will be changed from the warrants to the bonds. The transaction is not unlike that of the individual who gives his note for an indebtedness represented by a due-bill or open account, or who borrows from A to pay B. The indebtedness still exists though it may be evidenced by a different instrument, payable to a different creditor or more effectively secured.

Section 5, Article XIII above, has to do with the creation of *new* indebtedness or liability. The provision for funding an existing indebtedness is found in section 8, Article XII, where the entire subject is referred to the legislature. While it is true that by issuing and selling these bonds to take up the warrants, no *new* indebtedness will be incurred, it is equally true that when

the bonds are sold and the money received, the transaction has amounted to nothing more nor less than borrowing money from the purchaser of the bonds. (*Commonwealth v. Select and Common Council of Pittsburg*, 34 Pa. 496; *The Legal Tender Case*, 110 U. S. 421, 28 L. Ed. 204, 4 Sup. Ct. Rep. 122; *Scipio v. Wright*, 101 U. S. 665, 25 L. Ed. 1037.) This is the sense in which the term "borrowing money" is used throughout our Codes. Indeed, a county cannot borrow money in any other manner than by issuing its bonds or other evidence of indebtedness, and in our opinion it was to prevent just such a transaction as the one contemplated by respondent that section 2933 was enacted. Whether the legislation is wise or otherwise is not a matter of our concern. Section 5, Article XIII, has to do only with the creation of new indebtedness, while section 2933 relates to borrowing money, whether the money borrowed is to be used to refund existing indebtedness or for any other purpose mentioned in the Title of which that section forms a part.

If the commissioners were permitted to complete the issue and sale of these bonds, they would borrow \$100,000 on the credit of the county without the consent of the electors and without having submitted the question of a loan to a vote of the electors, and all in violation of the express prohibition of section 2933.

Appellant also invokes the provisions of Chapter 141, Laws of 1915, but in view of the conclusion already reached, we deem it unnecessary to consider that Act. Under the facts agreed upon, the plaintiff is entitled to the relief sought.

The judgment is reversed and the cause is remanded, with directions to enter a decree in favor of the plaintiff.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

ON REHEARING.

(Submitted April 30, 1917. Decided June 4, 1917.)

MR. JUSTICE SANNER delivered the opinion of the court.

We have carefully considered the arguments and additional authorities submitted on the rehearing of this cause, and we have reconsidered the foundations of the opinion heretofore filed herein. We see no escape from the conclusions there announced, and accordingly adhere to our decision.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

STATE EX REL. FENNER, RELATOR, v. KEATING,
RESPONDENT.

(No. 3,974.)

(Submitted February 5, 1917. Decided March 23, 1917.)

[163 Pac. 1156.]

*Elections — Voting Machine — Statute — Constitutional Law—
Statutory Construction.*

Statutes—Constitutional Construction—Rule.

1. Where a statute is assailed as unconstitutional, the question is not whether it is possible to condemn, but whether it is possible to uphold, and it will not be declared unconstitutional unless its nullity is placed, in the court's judgment, beyond reasonable doubt.

Elections—Voting Machine Statute—Constitutionality.

2. *Held*, that the Act providing for the use of voting machines (Laws 1907, Chap. 168 [secs. 609–625, Rev. Codes]) is not invalid as in contravention of the provision of section 1, Article IX, Constitution of Montana, that all elections by the people shall be "by ballot," the term "ballot" being employed, not to designate a piece of paper, but a method to insure, so far as possible, the secrecy and integrity of the popular vote.

[As to irregularities that will avoid an election, see note in 90 Am. St. Rep. 46.]

Constitutional Construction—Rule.

3. In interpreting a constitutional provision, the language used therein must be taken as having been designed to meet the needs of a progres-

sive society, and should not be strictly confined to its meaning as understood at the time the instrument was adopted.

Elections—Voting Machines—Statutory Construction.

4. Chapter 168, Laws 1907, requiring that voting machines shall be constructed so that they cannot be tampered with, does not require a machine which is proof against all tampering or manipulation but one which, when honestly operated, will enable an elector to secretly cast his vote as he wishes to cast it and have it counted as cast, and which cannot be tampered with or manipulated in such a way that, though properly operated by the elector, it would seem to receive and record his vote without doing so.

Original action in *quo warranto* by the State of Montana, on the relation of William D. Fenner, against William Keating. Demurrer to complaint sustained and proceeding dismissed.

Messrs. Maury & Wheeler, Mr. Edward Horsky and Mr. James M. Hinkle, for Relator, submitted a brief; *Mr. H. L. Maury* argued the cause orally.

The following questions are involved in this case: 1. Is the machine vote a vote by ballot as contemplated by the Constitution? 2. Does the machine register the intention of the voter? 3. Does the voter know that the machine registers his vote as intended? 4. Even if we were relying solely on the statute, is it such a machine as is contemplated by the statute? All of these questions are raised by our complaint. We say in substance in the complaint that the statute and use of the machine is in violation of the Constitution, and that it is in violation of the statute as well, so that in either view of the case, whether it is considered under the provisions of the Constitution or under the provisions of the statute, we earnestly contend that the use of the machines at said election was invalid and the votes so attempted to be cast on the machine are illegal.

A Constitution must be interpreted in the light of the circumstances existing at the time of the adoption of the Constitution. (*State ex rel. Jackson v. Kennie*, 24 Mont. 45, 60 Pac. 589.) We therefore insist that no definition by any court of a ballot of a later date than October 1, 1889, is of any persuasive force at all upon the court. Furthermore, "The province of the judiciary is not to make the law but to construe it. The meaning of a constitutional provision being plain it must stand, be

recognized and obeyed, as the supreme law of the land.” (*People v. May*, 9 Colo. 80, 10 Pac. 641,) With reference to the argument of hardship, resulting from giving effect to the plain terms of the Constitution, this court has answered such contention in the case of *Palmer v. City of Helena*, 19 Mont. 61, at p. 68, 47 Pac. 209. (See, also, *State v. City of Helena*, 24 Mont. 521, at p. 537, 81 Am. St. Rep. 453, 55 L. R. A. 336, 63 Pac. 99.)

What was the meaning of the word “ballot” in Montana on October 1, 1889? Many of our laws, institutions and customs in Montana came from California. The constitutional provision in point here is found in the California Constitution of 1849. It is found in the Constitution of 1879. It was not amended in any way until 1896. Then there was added, “or by such other method as may be provided by law, providing that secrecy in voting be preserved.” It was thought that this would permit the use of voting machines, but the advocates of this method were then faced with another constitutional provision preventing local authorities from discriminating against classes of electors in the manner of exercising the franchise. (*Eaton v. Brown*, 96 Cal. 371, 31 Am. St. Rep. 225, 17 L. R. A. 697, 31 Pac. 250; *Sanner v. Patton*, 155 Ill. 553, 40 N. E. 290.) In 1902, this amendment was made: “The legislature shall have power to provide that in different parts of the state different methods may be employed for receiving and registering the will of the people as expressed at elections, and may provide that mechanical devices may be used within designated subdivisions of the state at the option of the local authority indicated by the legislature for that purpose.” (Treadwell, Cal. Const., 78.)

Another reason why it was necessary to so amend their basic law before using machines at elections was that the legislature had established the meaning of the word “ballot” in that state and had given it essentially the same definition as that established by our territorial legislature and in existence for many years before October 1, 1889, and March 13, 1889. (*People v. Holden*, 28 Cal. 124.)

Secret balloting is not constitutional as to its origin, but statutory. Ballots may be used secretly or openly; they are none the less ballots when used openly than if used with the greatest privacy of the electors.

We find the word "ballot" used in the Twelfth Amendment of the Constitution of the United States without any reference to secrecy. We find substantially the same constitutional provision as ours in the Constitution of Delaware in 1831; of California, 1849; of Nevada, 1864; of Ohio, 1851. On page 926, section 1018, Compiled Statutes of 1887, we find the following: "A ballot or piece of paper on which shall be written or printed the names of the persons voted for, open or folded as the voter may choose." For the convenience of the court we array what we contend are the relevant and persuasive definitions of a ballot and as such definition existed on October 1, 1889, and perhaps subsequent. (Cooley's Constitutional Limitations, 7th ed., p. 910; *Brisbin v. Cleary*, 26 Minn. 107, 1 N. W. 825; *State v. Anderson*, 100 Wis. 523, 42 L. R. A. 239, 76 N. W. 482; *Daniel v. Simms*, 49 W. Va. 554, 39 S. E. 690; *State v. Timothy*, 147 Mo. 532, 49 S. W. 499; *Taylor v. Bleakley*, 55 Kan. 1, 49 Am. St. Rep. 233, 28 L. R. A. 683, 39 Pac. 1045; *Williams v. Stein*, 38 Ind. 89, 10 Am. Rep. 97; *People v. Holden*, 28 Cal. 123; Shannon's Code, Tennessee, 1, 896, par. 1265.)

A ticket is not a ballot until properly voted, and registers the intention of the voter, and if it cannot be determined by the vote whether it registered as intended, then it is not a ballot.

Mr. E. G. Toomey and *Messrs. Galen & Mettler*, for Respondent, submitted a brief; *Mr. A. J. Galen* and *Mr. Toomey* argued the cause orally.

The court will sustain the constitutionality of a law unless it appears beyond a reasonable doubt to be unconstitutional. (*In re O'Brien*, 29 Mont. 530, 1 Ann. Cas. 373, 75 Pac. 196; *Northwestern Mut. Ins. Co. v. Lewis & Clark County*, 28 Mont. 484, 98 Am. St. Rep. 572, 72 Pac. 982; *State v. Camp Sing*, 18 Mont. 128, 56 Am. St. Rep. 551, 32 L. R. A. 635, 44 Pac. 516;

Missouri River Power Co. v. Steele, 32 Mont. 433, 80 Pac. 1093; *Spratt v. Helena Power Transmission Co.*, 37 Mont. 60, 94 Pac. 631; *State v. McKinney*, 29 Mont. 375, 1 Ann. Cas. 579, 74 Pac. 1095; *Sweet v. Rechel*, 159 U. S. 380, 392, 393, 40 L. Ed. 188, 16 Sup. Ct. Rep. 43.) "That one entitled to vote shall not be deprived of the privilege by the action of the authorities is a fundamental principle." (Cooley's Constitutional Limitations, 7th ed., 926.)

Giving the rule of contemporaneous construction the dominant force claimed for it by relator, respondent insists that its application produces clear and convincing evidence that our constitutional provisions, "All elections by the people shall be by ballot," "All elections shall be free and open and no power, civil or military, shall at any time interfere or prevent the free exercises of the right of suffrage," and "The legislative assembly shall have the power to pass a registration and such other laws as may be necessary to secure the purity of elections and guard against abuses of the elective franchise," were adopted under circumstances and under a popular conception of the term "ballot" that leave no room to doubt that the framers of the Constitution intended to secure thereby a secret system of voting. (*State v. Hogan*, 24 Mont. 383, 62 Pac. 583.)

The inevitable conclusion from the authorities below is that the word "ballot" as used in Montana and elsewhere means any instrument that permits the casting of a secret vote, and that this is the only test that courts have ever seen fit to apply. (*State v. Anderson*, 26 Fla. 240, 8 South. 1; *Ex parte Arnold*, 128 Mo. 256, 49 Am. St. Rep. 557, 33 L. R. A. 386, 30 S. W. 768, 1036; *Williams v. Stein*, 38 Ind. 89, 10 Am. Rep. 97; *Ritchie v. Richards*, 14 Utah, 345, 47 Pac. 670; *Brisbin v. Cleary*, 26 Minn. 107, 1 N. W. 825; *Opinion of Judges*, 7 Me. 495; *Temple v. Mead*, 4 Vt. 535; *People v. Cicott*, 16 Mich. 297; *Attorney General v. Detroit Com. Council*, 58 Mich. 213, 217, 55 Am. Rep. 675, 24 N. W. 887; *People v. Pease*, 27 N. Y. 45, 84 Am. Dec. 242.)

Constitutional requirements of various states and decisions of courts: A requirement identical with, or similar to section 1,

Article IX, of our Constitution exists in the Constitutions of nearly all of the states of the United States, and in over twenty of these states voting machine laws have been enacted. Eight states in which this requirement exists have passed upon the constitutionality of the voting machine law and of the machines used in pursuance thereof, and in seven of these cases the constitutionality of the law and the use of the machines has been affirmed. Another state (Massachusetts), under a constitutional provision requiring a "*written vote*," has denied the validity of its voting machine statute. In each case the court has decided that the use of the voting machine, under the voting machine law of the state in question, complied with the requirement that all elections should be by ballot. The cases in which this question has been specifically passed upon, in favor of the validity of such Acts, are as follows: *In re McTammany Voting Machine*, 19 R. I. 729, 36 L. R. A. 547, 36 Atl. 716; *City of Detroit v. Board of Inspectors of Election*, 139 Mich. 548, 111 Am. St. Rep. 430, 5 Ann. Cas. 861, 69 L. R. A. 184, 102 N. W. 1029; *Lynch v. Malley*, 215 Ill. 574, 2 Ann. Cas. 837, 74 N. E. 723; *U. S. Standard Voting Machine Co. v. Hobson*, 132 Iowa, 38, 119 Am. St. Rep. 539, 10 Ann. Cas. 972, 7 L. R. A. (n. s.) 512, 109 N. W. 458; *Elwell v. Comstock*, 99 Minn. 261, 9 Ann. Cas. 270, 7 L. R. A. (n. s.) 621, 109 N. W. 113, 698; *Spickerman v. Goddard*, 182 Ind. 523, L. R. A. 1915C, 513, 107 N. E. 2; *State ex rel. Empire Voting Machine Co. v. Carroll*, 78 Wash. 83, 138 Pac. 306; *Henderson v. Board of Election Commrs.*, 160 Mich. 36, 124 N. W. 1105; *Helme v. Board of Election Commrs.*, 149 Mich. 390, 119 Am. St. Rep. 681, 12 Ann. Cas. 473, 113 N. W. 6. *Contra*: *State ex rel. Karlinger v. Board of Deputy State Supervisors of Elections*, 80 Ohio St. 471, 24 L. R. A. (n. s.) 188, 89 N. E. 33 (by a divided court); *Nichols v. Board of Election Commrs.*, 196 Mass. 410, 124 Am. St. Rep. 568, 12 L. R. A. (n. s.) 280, 82 N. E. 50.

Opinion—PER CURIAM.

Original action in *quo warranto* by the relator to have determined his title to the office of state auditor. The relator and

the respondent, both eligible to hold the office, were respectively the duly nominated candidates of the Republican and Democratic parties to be voted for at the election held on November 7, 1916. There was also a candidate of the Socialist party, but the vote cast for him was so relatively small that reference to it may be omitted. The basis of the relator's claim as set out in his complaint may be stated, in substance, as follows: According to the returns as finally canvassed, the relator received throughout the state 73,184 votes, and the respondent received 73,845 votes—an apparent majority for the respondent of 661. Among the votes so cast and counted are those cast by means of voting machines in twenty-eight of the sixty-eight precincts of Silver Bow county, whereof the relator received 3,690 and the respondent 5,125, all of which should be rejected as illegal because not cast by ballot as required by section 1, Article IX, of the Constitution, and because the machines, if their use can be constitutionally proper, do not comply with the statute which assumes to authorize them. These votes eliminated, a majority for the relator of 774 is disclosed, thus vesting title to the office in him.

1. The first contention is that, since the section of the Constitution *supra* requires "all elections by the people shall be by ballot," every vote cast at an election must be by means of a piece of paper on which are printed or written the names of the persons voted for, with a proper designation of the office each is intended to fill, delivered to the judges of election; in other words, adopting the definition of the term "ballot" by the supreme court of Ohio, it means: "A printed or written expression of the voter's choice upon some material capable of receiving and reasonably retaining it, prepared or adopted by each individual voter and passing by the act of voting from his exclusive control into that of the election officers, to be by them accepted as the expression of his choice." (*State ex rel. Karlinger v. Board of Deputy State Supervisors of Elections*, 80 Ohio St. 471, 24 L. R. A. (n. s.) 188, 89 N. E. 33.) This definition, if accepted as correct, would preclude any further discussion; but an acceptance of it involves the rejection, as invalid, of the

Act of the legislature authorizing the use of voting machines, [1] and we must repeat that, in the case of statutes passed by the legislative assembly and assailed as unconstitutional, the question is not whether it is possible to condemn, but whether it is possible to uphold. We stand committed to the rule that a statute will not be declared unconstitutional unless its nullity is placed, in our judgment, beyond reasonable doubt. (*State ex rel. Hay v. Alderson*, 49 Mont. 387, Ann. Cas. 1916B, 39, 142 Pac. 210.) Several considerations compel the view that the statute can and should be upheld.

In the first place, the term "ballot" has a most interesting [2] history, into which we need not enter further than to say that, from its origin as descriptive of voting by means of balls put into an urn, its primary significance has always been a method whereby the voter might cast his vote in secret, as distinguished from a showing of hands or *viva voce* wherein secrecy is impossible. (See Ency. Britannica, under article "Ballot, Voting, Voting Machines"; also, cases cited below.) The view that permanent recordation of the elector's choice on paper or anything else is an essential part of the process of voting by ballot finds no justification in etymology and scarcely any in the course of legislation having to do with the subject in this and other countries where such voting has obtained. But it is insisted that in Montana the matter was set at rest by the provisions of section 1018, page 926, Compiled Statutes of 1887, as follows: "Every elector shall deliver, in full view of one of the judges of election, a single ballot or piece of paper, on which shall be written or printed the names of the persons voted for, with a pertinent designation of the office which he or they may be intended to fill; said ballots may be open or folded, as the voter may choose." The argument is that these provisions fix the meaning of "elections by ballot" as used in the Constitution and established beyond peradventure that paper is, and secrecy is not, a vital part of that meaning. The fact is that, when the convention met, the section quoted was not in force, having been superseded by the Australian Ballot Law (Session

Laws 1889, p. 145), under which secrecy became compulsory; but the point about secrecy as an element of voting by ballot is not so much that it be compulsory as that it be possible, and therein lies a distinction between voting by ballot and voting by the Australian method. Conceding, however, that by the section quoted and by the Australian Ballot Law as in force when the convention met, and by the course of legislation up to the enactment of the voting machine law, the idea of voting by ballot had its exposition in this community only in the form with which we are most familiar, and that it implied pieces of paper on which the voter should record his choice from among the names of the candidates written or printed thereon, it does not follow that this is a contemporaneous construction, absolutely defining the scope of the constitutional language. These enactments amount to nothing more than a legislative selection of one of the modes in which voting by ballot may be conducted, which mode for the time being should be followed. (*Lynch v. Malley*, 215 Ill. 574, 2 Ann. Cas. 837, 74 N. E. 723.) It cannot for a moment be supposed that the framers of our Constitution, or the people who adopted it and to whom was available the knowledge of the many changes in form through which voting by ballot had gone, intended then and there to put a stop to all progress in that direction, or to say that the method most familiar to them was the only one that could answer to the constitutional language. Indeed, the contrary must be assumed if we impute to them a fair average of human intelligence and curiosity; for it is certain that before that time devices for the secret automatic casting and counting of votes, free from the delay and frauds incident to the methods then in vogue, were being sought and at that time the voting machine, essentially as we know it, was an actuality. (Wigmore on Australian Ballot, p. 201.)

Again, we may assume, for argument's sake, that such a thing [3] as the voting machine, or any other form of balloting save with pieces of paper, did not enter the minds of those who framed or those who adopted the Constitution; still the proper

interpretation of any constitutional provision requires us to remember that it is a part of the organic law—organic not only in the sense that it is fundamental, but also in the sense that it is a living thing designed to meet the needs of a progressive society, amid all the detail changes to which a progressive society is subject. “We are to suppose,” as said by Chief Justice Parker, “that those who were delegated to the great business of distributing the powers which emanated from the sovereignty of the people, and to the establishment of rules for the perpetual security of the rights of person and property, had the wisdom to adapt their language to future as well as existing emergencies; so that words competent to the then existing state of the community, and at the same time capable of being expanded to embrace more extensive relations, should not be restrained to their more obvious and immediate sense, if, consistently with the general object of the authors and the true principles of the compact, they can be extended to other relations and circumstances which an improved state of society may produce.” (*Henshaw v. Foster*, 9 Pick. (26 Mass.) 312.) A familiar application of this canon is seen in the history of the post roads provision of our national Constitution. This provision was promulgated when post roads were confined to waterways and to land routes traversed only by people afoot or on horseback or in vehicles drawn by domestic animals; specially constructed ways for steam and electric traction could not have been in contemplation; yet it is settled to the satisfaction of everyone that such specially constructed ways can and do fall within the purview of this provision. So here, the provision that elections should be by ballot was employed not to designate pieces of paper, but a method which would insure, so far as possible, the secrecy and the integrity of the popular vote. The voting machine, if capable of accomplishing what is claimed for it, is a distinct step in advance of the prevailing method toward securing what the provision in question demands; and it will overcome in a striking degree many of the evils now said to surround the conduct of elections. If by its use the main purpose of the Constitution

is furthered and the elector may cast his vote in secret with the assurance that it will be counted as cast, there can be no sound reason why the method should be dismissed as an innovation upon the letter of the law.

Finally, the definition and conclusion of the Ohio court are contrary to the weight of judicial authority. In not less than six states on not less than eight different occasions this precise question has been submitted for adjudication, and the use of voting machines has been upheld as in conformity with constitutional provisions similar to our own. (*United States Voting Machine Co. v. Hobson*, 132 Iowa, 38, 119 Am. St. Rep. 539, 10 Ann. Cas. 972, 7 L. R. A. (n. s.) 512, 109 N. W. 458; *Elwell v. Comstock*, 99 Minn. 261, 9 Ann. Cas. 270, 7 L. R. A. (n. s.) 621, 109 N. W. 113, 698; *Henderson v. Board of Election Commrs.*, 160 Mich. 36, 124 N. W. 1105; *Lynch v. Malley*, *supra*; *In re McTammany Voting Machine Co.*, 19 R. I. 729, 36 L. R. A. 547, 36 Atl. 716; *Detroit v. Board of Inspectors etc.*, 139 Mich. 548, 111 Am. St. Rep. 430, 5 Ann. Cas. 861, 69 L. R. A. 184, 102 N. W. 1029; *State ex rel. Empire Voting Machine Co. v. Carroll*, 78 Wash. 83, 138 Pac. 306; *Helme v. Board of Election Commrs.*, 149 Mich. 390, 119 Am. St. Rep. 681, 12 Ann. Cas. 473, 113 N. W. 6.)

2. The claim that the voting machines used in Silver Bow [4] county do not comply with the law which authorizes their use is based upon a provision in section 2 of the Act (Session Laws 1907, Chap. 168) that "the machine must be constructed so that it cannot be tampered with or manipulated for any fraudulent purpose," coupled with certain allegations of the complaint to the effect that said machines can be so tampered with. The provision quoted is to be read in connection with the balance, and particularly sections 14 and 15 of the Act; so read, it becomes obvious that the Act does not require a machine which is proof against all tampering or manipulation—no human contrivance can possess this immunity—but does require a machine which shall possess certain features which, when it is honestly operated, will enable the elector to secretly cast his vote

as he wishes to cast it and have it counted as cast, and which cannot be tampered with or manipulated in such a way that, though properly operated by the elector, it would seem to receive and record his vote without doing so. There are no allegations in the complaint to justify the inference that the voting machines in question are thus defective, or that they have ever failed to accurately receive and record the votes attempted to be cast by their means, or that the relator has through their use lost any votes intended to be cast for him. We are therefore of the opinion that no issue is presented in this behalf.

The demurrer to the complaint is sustained, and as the cause was argued and submitted on the theory that no questions other than those presented by the complaint as filed, and the demurrer thereto, could be raised, it is now adjudged that the proceeding be dismissed and the respondent confirmed in his office.

Dismissed.

STATE EX REL. TRACY, RELATOR, v. O'ROURKE, RESPONDENT.

(No. 3,975.)

(Submitted February 5, 1917. Decided March 23, 1917.)

[163 Pac. 1159.]

(For syllabus, see *State ex rel. Fenner v. Keating*, ante, p. 371.)

QUO WARRANTO proceeding by the State on the relation of William D. Tracy against John K. O'Rourke. Demurrer to complaint sustained and proceeding dismissed.

Mr. Edward Horsky, Mr. James M. Hinkle and Messrs. Maury & Wheeler, for Relator.

Messrs. Walsh, Nolan & Scallon, for Respondent.

Opinion—PER CURIAM.

Quo warranto to try title to the office of sheriff of Silver Bow county. The relator and the respondent were candidates for said office at the last general election upon the Republican and Democratic tickets, respectively. There was also a candidate of the Socialist party, but the vote cast for him was not sufficient to make the same an element in this controversy. Upon the final canvass it was found and declared that the relator had received 8,951 votes and the respondent 9,990 votes, an apparent plurality for the respondent of 1,039. But among these were the votes—9,282 in number—cast by means of voting machines in twenty-eight of the sixty-eight precincts of the county, of which votes so cast the relator received 3,986 and the respondent 5,296; and, if said votes be all rejected as illegal, the relator stands elected by a plurality of 271 votes and is thus entitled to the office.

The questions presented are the same, and they are presented in the same way, as in *State ex rel. Fenner v. Keating*, ante, p. 371, 163 Pac. 1156. On the authority of that decision, the demurrer to the complaint herein is sustained, and it is adjudged that this proceeding be dismissed.

Dismissed.

STATE, RESPONDENT, v. WILEY, APPELLANT.

(No. 3,822.)

(Submitted March 15, 1917. Decided March 23, 1917.)

[164 Pac. 84.]

Criminal Law — Grand Larceny — Information—“Recent Possession” of Stolen Property—Instructions.

Criminal Law—Refusal of Correct Instruction—When not Error.

1. Refusal of a correct instruction on the subject of felonious intent in a prosecution for larceny was not error, where the court had fully covered the matter by appropriate instructions given.

Same—Information—Degrees of Crime.

2. Where a specific crime is divided into degrees, it is, generally speaking, sufficient to charge the commission of the substantive offense, leaving it to the jury to determine from the evidence the particular degree of which the accused is guilty.

Same—Larceny and Grand Larceny—Instructions.

3. The substantive crime alleged in an information charging the theft of a horse—under section 9324, Revised Codes, made grand larceny without reference to value—being larceny, instructions defining larceny as well as grand larceny were not open to the objection that different definitions of the same offense—some of which inapplicable to the facts of the case—were thus submitted.

[As to what constitutes larceny, see notes in 57 Am. Dec. 271; 88 Am. St. Rep. 559.]

Same—"Recent Possession" of Stolen Property.

4. The words "recent possession," used in an instruction advising the jury relative to the probative value of recent possession of stolen property, *held* to refer to possession in defendant soon after commission of the larceny, and not to possession immediately before the information is filed or a trial had.

Same—Instructions.

5. Instructions substantially in the words of sections 8119 and 9167, Revised Codes, defining a principal and telling the jury that the distinction between a principal and an accessory had been abrogated by statute, were not improper as implying that a felony had been committed.

Appeal from District Court, Ravalli County; R. Lee McCulloch, Judge.

B. S. WILEY was convicted of grand larceny, and appeals from the judgment and an order denying him new trial. Affirmed.

Cause submitted on briefs of counsel.

Mr. J. D. Taylor, for Appellant.

Mr. J. B. Poindexter, Attorney General, and *Mr. J. H. Alvord*, Assistant Attorney General, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

B. S. Wiley was convicted of grand larceny, and appealed from the judgment and from an order denying him a new trial.

The evidence offered by the state discloses that in the spring of 1914 John S. Treece, the owner of a small black gelding

branded combination J. T. inverted, turned the animal out on the range in Ravalli county; that in July following, the same animal was seen in the defendant's possession; that the defendant again turned the animal out on the range; that in October the animal was in defendant's possession, and continued in his possession until about the end of November; that during this period defendant attempted to trade it to Claude Chaffin; that about the last of November he traded it to Tom Randolph, who kept it throughout the winter and branded it in the spring of 1915; that soon thereafter the owner discovered the animal in Randolph's possession and laid claim to it; that Treece, Randolph and defendant met in Hamilton within a few days, and defendant then stated to Treece that he had secured the animal in good faith from one Jensen from the Big Hole country, and had in turn traded it to Randolph; that later defendant told Treece that his first story was false, and that it was invented at the suggestion of Randolph to clear him from any appearance of wrongdoing; that in fact the animal was gathered in defendant's pasture with animals belonging to defendant; that Randolph, seeing the animal and being informed by defendant that it was apparently an unbranded stray, took it from defendant's possession, and later placed his own brand upon it. Upon the trial the court gave certain instructions which were excepted to by the defendant, and refused two instructions tendered by the defendant.

1. In each of the two offered instructions the defendant sought [1] to have impressed upon the jury the idea that the felonious intent to steal must have accompanied the original taking, and that if it did not, larceny was not committed even though it might appear that defendant afterward converted the animal to his own use with intent to deprive the true owner of his property. Conceding, for the sake of argument, that each of these tendered instructions is correct, it does not follow that the court erred in refusing them. In Instruction 3, given, the court charged that "a felonious intent must have accompanied" the taking in order to constitute larceny, and in Instruction 5 the

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well as the particular degree of it, of which the defendant was guilty, if guilty at all. There is not anything said in *State v. Dickinson*, 21 Mont. 595, 55 Pac. 539, in conflict with these views. In this instance the court repeatedly impressed upon the jurors the fact that they must find the allegations of the information to be true in order to return a verdict of guilty.

3. By Instruction 11 the court advised the jury of the [4] probative value of evidence of recent possession of stolen property. The objection urged upon us is that there is not any evidence that the defendant was in possession of the animal in question, recently, that is, immediately before the information was filed in June, 1915. Appellant misconceives the meaning of the term "recently," as applied in this connection in the law of larceny. "Recently" or "recent possession" refers to possession in the defendant soon after the commission of the larceny, and not to possession immediately before the information is filed or a trial had. (4 Words and Phrases, 2d Series, 206; *State v. Willette*, 46 Mont. 326, 127 Pac. 1013.)

4. The court gave, in substance, sections 8119 and 9167, Revised Codes, defining a principal and advising the jury that the [5] distinction between accessory before the fact and a principal in a felony case has been abrogated by statute, and that all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense or aid and abet in its commission, are to be prosecuted as principals. The objection urged to these instructions is that there is not any evidence which warrants their submission, but with this we do not agree. Taking the evidence as a whole, we think the jury might, with propriety, have drawn the inference that Randolph was the titular principal, and that this defendant aided and abetted him in the commission of the offense. Neither of these instructions is open to the charge that it implies that a felony had been committed. They might have been amplified somewhat to make a concrete application, but defendant did not ask that any such application be made.

jury was informed that in order to find the defendant guilty, it was necessary to find that the defendant took the animal into his possession, that he knew at the time that it was not his property, "and that he intended *then* to steal and convert it to his own use," *etc.* We think the jury could not have misunderstood the meaning which the court intended to convey by these expressions. It is not error to refuse a correct instruction when the court has fully covered the subject by appropriate instructions given. (*State v. Martin*, 29 Mont. 273, 74 Pac. 725.)

2. The court defined larceny in the language of section 8642, [2, 3] Revised Codes, and grand larceny in the language of subdivision 4, section 8645, Revised Codes. Counsel for appellant apparently assumes that the court gave different definitions of the same offense, some of which were not applicable to the facts of this case; but attention is directed to the fact that the substantive crime defined in Chapter V, Title XIII, Part I, of the Penal Code, is larceny, and that grand larceny and petit larceny are but the two separate degrees of that crime. Section 8642 defines larceny, and section 8644 provides: "Larceny is divided into two degrees, the first of which is termed grand larceny, the second petit larceny." There is no punishment prescribed for larceny *as such*, but the degree of punishment is made to depend upon the degree of the crime. (Secs. 8647, 8648, Rev. Codes.) Speaking generally, where a specific crime is divided into degrees, it is sufficient to charge the commission of the substantive offense (*State v. Copenhaver*, 35 Mont. 342, 89 Pac. 61; *State v. Mish*, 36 Mont. 168, 122 Am. St. Rep. 343, 92 Pac. 459), and it is then made the duty of the jury to determine from the evidence the particular degree of the crime of which the accused is guilty, if guilt be shown. (Rev. Codes, sec. 9324.) It is true that the information charges the theft of an animal the stealing of which is grand larceny without reference to its value; but, even so, the substantive crime is larceny, and no fault can be found with the court for defining that offense as

well as the particular degree of it, of which the defendant was guilty, if guilty at all. There is not anything said in *State v. Dickinson*, 21 Mont. 595, 55 Pac. 539, in conflict with these views. In this instance the court repeatedly impressed upon the jurors the fact that they must find the allegations of the information to be true in order to return a verdict of guilty.

3. By Instruction 11 the court advised the jury of the [4] probative value of evidence of recent possession of stolen property. The objection urged upon us is that there is not any evidence that the defendant was in possession of the animal in question, recently, that is, immediately before the information was filed in June, 1915. Appellant misconceives the meaning of the term "recently," as applied in this connection in the law of larceny. "Recently" or "recent possession" refers to possession in the defendant soon after the commission of the larceny, and not to possession immediately before the information is filed or a trial had. (4 Words and Phrases, 2d Series, 206; *State v. Willette*, 46 Mont. 326, 127 Pac. 1013.)

4. The court gave, in substance, sections 8119 and 9167, Revised Codes, defining a principal and advising the jury that the [5] distinction between accessory before the fact and a principal in a felony case has been abrogated by statute, and that all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense or aid and abet in its commission, are to be prosecuted as principals. The objection urged to these instructions is that there is not any evidence which warrants their submission, but with this we do not agree. Taking the evidence as a whole, we think the jury might, with propriety, have drawn the inference that Randolph was the titular principal, and that this defendant aided and abetted him in the commission of the offense. Neither of these instructions is open to the charge that it implies that a felony had been committed. They might have been amplified somewhat to make a concrete application, but defendant did not ask that any such application be made.

There is not any merit in the contentions made in behalf of appellant, and the judgment and order are accordingly affirmed.

Affirmed.

MR. JUSTICE SANNER concurs.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

HARRINGTON, RESPONDENT, v. CRICHTON, APPELLANT.

(No. 3,987.)

(Submitted March 17, 1917. Decided March 23, 1917.)

[164 Pac. 537.]

Elections—Ballots—Stub—Official Stamp—Mistake of Election Officials—Effect.

Elections—Ballots—Official Stamp on Stub—Removal—Effect.

1. Where ballots had been delivered to electors by the judges of election with the official stamp apparently in the place in which the law (Rev. Codes, sec. 551) requires it to be, although in reality it was on the stub instead of on the ballot proper, the act of the judges in removing the stamp with the stub—thus leaving the ballot without the stamp—did not render the ballots void.

[As to effect on election of irregular canvass of returns, see note in Ann. Cas. 1916A, 710.]

Same—Ballots—Erroneous Act of Election Officials—Effect.

2. The strict rule that an elector who negligently receives an unstamped ballot will not be heard to complain that his ballot remains uncounted because void does not obtain where a stub is provided for at the head of the ballot separated from it by a perforation requiring minute scrutiny to determine its presence, to be removed when the ballot is cast, where fraud is not present, and where the error by reason of which it is sought to disfranchise him was that of the election officials in placing the stamp upon the stub instead of on the ballot itself.

Same—Ballots—Electors must Exercise Ordinary Care.

3. An elector is chargeable with no more than ordinary care, in casting his ballot, to ascertain that the official stamp is placed thereon in the position in which the law apparently requires it to be, and to so fold it as to have the stamped inscription in view.

Appeal from District Court, Lewis and Clark County; R. Lee Word, Judge.

ELECTION CONTEST by Eva Harrington against May J. Crichton. Judgment for contestant, and contestee appeals. Reversed and remanded.

Messrs. Wight & Pew and *Mr. Ed. Phelan* submitted a brief in behalf of Appellant; *Mr. Chas. E. Pew* and *Mr. Phelan* argued the cause orally.

Mr. C. A. Spaulding and *Mr. J. R. Wine*, for Respondent, submitted a brief; *Mr. Spaulding* argued the cause orally.

HONORABLE JOHN A. MATTHEWS, Judge of the Fourteenth Judicial District Court, sitting in place of the Chief Justice, delivered the opinion of the court.

The parties to this action were, at the last general election, rival candidates for the office of county superintendent of schools for Lewis and Clark county, both being legally qualified and duly nominated. The board of canvassers found that appellant had received the highest number of votes cast for said office and declared her duly elected, and caused a certificate of election to be issued to her. Being dissatisfied with the result of the election, respondent filed her petition of contest. Issue was joined and a trial had, resulting in a judgment in favor of respondent declaring her duly elected to said office, and declaring the certificate so issued to appellant null and void. From this judgment the appellant appeals, assigning as error, among [1] others: “(3) The district court erred in refusing to count the ballots from the Gilman precinct, the Elkhorn precinct, and other ballots, the sufficiency of the stamping of which was questioned.” This is the main contention and controlling question in the case, and is based on the findings of the court below, appearing in its memorandum opinion, that: (1) “During the recount of said ballots by the attorneys for the respective parties, and in the presence of the court, ballots were found in the returns of more than one precinct within the city, and from at least two precincts outside the city, that did not have on the

back thereof the official stamp. * * * ” (2) “The exclusion of the unstamped ballots found in the several precincts, other than precinct No. 31, Gilman precinct, if, under the law, they should not be counted, would not change the result; if, however, the unstamped ballots in precinct 31 should not have been counted by the judges of election, and were to be disregarded on the official count, the result would be the election of the contestant.” And the conclusions of law based on said findings, that the ballots not stamped should not have been counted, resulting in the judgment heretofore mentioned.

It appears from the evidence adduced at the trial that in Gilman precinct No. 31, through an erroneous interpretation of the instruction to judges of election, sent out according to law by the county clerk, that “on the back near the top of the ballot must be stamped the words ‘official ballot,’ the name and number of the election precinct,” the judges systematically stamped each ballot before delivery, with the rubber stamp furnished, “on the back near the top” of the sheet on which was printed the blank ballot, but so near the top that the entire legend thereof appeared above the perforation. Each ballot, when voted, was returned by the voter so folded that the official stamp and the number of the ballot were on the outside, so that the judges of election could tell at a glance that the paper returned was the official ballot delivered to the voter. Thereupon the ballot judge tore off the stub and with it the official stamp so placed above the perforation, and placed the ballot in the box provided for that purpose. On the closing of the polls the box was opened; the ballots counted; results entered as required by law; and the ballots so counted, being the same ballots that went into the box during the day in the regular course of voting, were sealed in an envelope, indorsed and delivered to the county clerk, and, on the trial, produced in court.

The contention of respondent, sustained by the court below, is that inasmuch as no ballot in precinct No. 31 was, at the time it was taken from the box and counted, indorsed with the official stamp, every ballot cast in said precinct was void and should

not have been counted. The court below found that there was no evidence of fraud of any kind in the election, and that there was no evidence that any ballot-box had been tampered with and, in fact, there is no contention of fraud or irregularity in the election, other than the irregularity in the stamping of ballots in the precincts named. The whole question, therefore, is whether under the law the appellant, who was admittedly the choice of a clear majority of the people of her county, shall lose the fruits of victory through the irregularity in stamping ballots referred to.

Section 9, Article IX, of the Constitution of the state of Montana, provides: "The legislative assembly shall have the power to pass a registration and such other laws as may be necessary to secure the purity of elections and guard against abuses of the elective franchise." The legislature has provided a general registration law and present set of rather elaborate and effectual laws to secure the purity of our elective franchise and for the prevention of fraud in elections. Under these laws a uniform ballot is provided. It is printed and distributed at the public expense, and no other ballots than those so provided can be cast or counted. (Rev. Codes, sec. 542.)

Section 545, after providing for the blank form of ballot, reads as follows: "The ballot shall be printed on the same leaf with a stub, and separated therefrom by a perforated line. The part above the perforated line, designated as the stub, shall extend the entire width of the ballot," *etc.*

The county clerk is required to furnish each precinct with the appropriate stamp, with ink pad for the purpose of designating or stamping the official ballots. (Sec. 547.)

Section 551 then provides: "At any election the judges of election must designate two of their number whose duty it is to deliver ballots to the qualified electors. Before delivering any ballot to an elector, the said judges must print on the back, and near the top of the ballot, with the rubber or other stamp provided for the purpose, the designation 'official ballot' and the other words on same, as provided for in section 547 of this

chapter; and the clerks must enter on the poll lists the name of such elector and the number of the stub attached to the ballot given him. * * *

“Sec. 552. On receipt of his ballot the elector must forthwith, without leaving the polling place and within the guard rail provided, and alone, retire to one of the places, booths or compartments, if such are provided, and prepare his ballot. * * * After preparing his ballot, the elector must fold it so the face of the ballot will be concealed and so that the indorsements stamped thereon may be seen, and hand the same to the judges in charge of the ballot-box, who shall announce the name of the elector and the printed or stamped number on the stub of the official ballot so delivered to him, in a loud and distinct tone of voice. If such elector be entitled then and there to vote, and if such printed or stamped number is the same as that entered on the poll list as the number on the stub of the official ballot last delivered to him by the ballot judge, such judge shall receive such ballot, and after removing the stub therefrom in plain sight of the elector and without removing any other part of the ballot, or in any way exposing any part of the face thereof below the stub, shall deposit each ballot in the proper ballot-box for the reception of voted ballots, and the stubs in a box for detached stubs. * * * ”

Section 572 provides: “As soon as the polls are closed the judges must immediately proceed to canvass the votes given at such election. The canvass must be public in the presence of bystanders, and must be continued without adjournment until completed and the result thereof is publicly declared.

“Sec. 573. * * * The judges must then take out of the box the ballots unopened except to ascertain whether each ballot is single, and count the same to determine whether the number of ballots correspond with the number of names on the poll lists. * * * ”

Section 575 provides: “In the canvass of the votes any ballot which is not indorsed, as provided in this title, by the official stamp, is void and must not be counted, and any ballot or parts

of a ballot from which it is impossible to determine the elector's choice, is void and must not be counted; if part of a ballot is sufficiently plain to gather therefrom the elector's intention, it is the duty of the judges of election to count such part."

From the entire comparison of the sections quoted, it clearly [2] appears that the duties imposed by law upon the electors and the judges of election are largely reciprocal, and in many material matters the elector may, by his own negligence, render his ballot void in whole or in part. Thus he should be held chargeable with seeing that the official ballot delivered to him by the judges of election has stamped "on the back and near the top" the appropriate designation of the official ballot, and, if he negligently receives a ballot not so stamped or on which the stamp is glaringly deficient or lacking in some of the essential elements required by law, he cannot be heard to complain that his vote is not counted and that his ballot is void. (*Slaymaker v. Phillips*, 5 Wyo. 453, 47 L. R. A. 842, 40 Pac. 971, 42 Pac. 1049; *Newhouse v. Alexander*, 27 Okl. 46, Ann. Cas. 1912B, 674, 30 L. R. A. (n. s.) 602, 110 Pac. 1121; *Orr v. Bailey*, 59 Neb. 128, 80 N. W. 495; *Mauck v. Brown*, 59 Neb. 382, 81 N. W. 313; *Kelso v. Wright*, 110 Iowa, 560, 81 N. W. 805; *Kelly v. Adams*, 183 Ill. 193, 55 N. E. 837; *Miller v. Schallern*, 8 N. D. 395, 79 N. W. 865.) The cases above correctly state the general rule: "If the statute expressly declares any particular act to be essential to the validity of the election, or that its omission shall render the election void, all courts whose duty it is to enforce such statute must so hold, whether the particular act in question goes to the merits, or affects the result or not. Such a statute is imperative, and all considerations touching its policy or impolicy must be addressed to the legislature." (McCrary on Elections, 3d ed., sec. 190.) No one of the cases cited, however, was decided upon a statute similar to the one here under consideration, that is, under a statute providing for a "stub" at the head of the official ballot, separated from it only by a perforation, requiring minute scrutiny to determine its presence.

An examination of the statutes on the subject discloses the fact that section 575 was enacted prior to the provision for a stub at the head of the ballot. With the old form of ballot, with nothing to be removed, the unfortunate circumstances surrounding the voting at Gilman could not have arisen; either the ballot would have been properly stamped, or stamped not at all, to be in the first instance accepted, and in the second rejected. Under such circumstances, the reasoning of the courts as expressed in *Kelly v. Adams, supra*, is convincing: "To ignore this provision of the statute, and allow ballots to be counted which do not contain the official indorsement, would authorize the voting of ballots that might have been surreptitiously obtained or copied, and one of the purposes of the ballot law be entirely frittered away and the door opened for fraud." But does the reason for such a strict construction of the statute prevail under our present law?

The legislature, by providing for the stub to be numbered, and to be removed only at the time of depositing the ballot in the ballot-box, has hit upon an effective method of guarding against fraud and illegal voting, and has insured the deposit of the voted ballot in the ballot-box, and the provisions of section 575 should now be construed in the light of the changed conditions. The problem presented to the legislature was first to secure to the voter a free, untrammelled vote, and, second, to secure a correct record and return of that vote; and the legislative body is presumed to have had that problem in mind in preparing rules for the guidance of both the elector and the election officers. But the rules laid down are but a means to an end; to hold a slight infraction of those rules fatal, when the elector has substantially complied with the requirements and the mistake is but a technical error of the election officials, and in the face of the fact that the result was precisely what it would have been had no error been committed, and such holding would defeat the clear expression of the will of the majority, would be to subordinate substance to form and defeat the end sought to be secured. It would be to render that, which was intended to prevent fraud

and injustice, an instrument of injustice. The power to disfranchise an entire precinct—while it does exist—should be exercised with great care, and effect should be given to the expression of the will of the majority, when that expression is clear and free from any taint of fraud, and when possible to do so without violating the spirit of the statute.

In the case of *Talcott v. Philbrick*, 59 Conn. 472, 485, 10 L. R. A. 150, 20 Atl. 436, the court said: "All statutes tending to limit the exercise of the elective franchise by the citizen should be liberally construed in his favor. * * * A great constitutional privilege—the highest under our government—is not to be taken away on a mere technicality, but the most liberal intendment should be made in support of the elector's action whenever the application of common-sense rules which are applied in other cases will enable the courts to understand and render it effectual." The error or mistake by reason of which it is sought to disfranchise the entire electorate of Gilman precinct was that of the sworn officials of the state, charged with the protection and safeguarding of the rights of the people. In the case of *Moyer v. Van De Vanter*, 12 Wash. 377, 50 Am. St. Rep. 900, 29 L. R. A. 670, 41 Pac. 60, the court said: "There is good ground for recognizing a distinction between the obligation placed upon the individual voter and those matters which relate to the duties of election officers. Great care should be taken to distinguish between those requirements designed to prevent fraud, and which are necessary to preserve the purity of elections, and those which, while designed for the same purpose, are not essential thereto, or we may overreach the salutary effect sought to be obtained from provisions of the character of the first mentioned, by going so far, in construing as valid and mandatory provisions of the second class, as to open the very door to fraud that was sought to be closed thereby." With this declaration of the Washington court we heartily agree; and in this connection the reasoning of this court in the case of *Lane v. Bailey*, 29 Mont. 548, 75 Pac. 191, applies with peculiar force, though referring to a dissimilar state of facts. There, when

a registry agent had failed to require the elector to take the oath provided for, the court held that his vote should nevertheless be counted, saying: "If the elector may be deprived of his right to vote in this manner, an unprincipled registry agent may change the political status of a precinct at will, and, by concerted action on the part of a number of such, the political complexion of a county may be easily changed, and the popular will be effectually thwarted. If the elective franchise may be thus tampered with, incalculable abuses will creep into the state."

Each elector of Gilman precinct received from the proper judge of election a ballot on which that judge did "print on the back and near the top" the prescribed inscription. Each elector prepared his ballot according to law and did "so fold it that the face of the ballot will be concealed and so that the indorsements stamped thereon could be seen." He then delivered it to the proper officer who, in his presence, detached the stub and [3] deposited the ballot in the ballot-box. It would seem that the elector should be chargeable with no more than ordinary care, and that when he ascertained that the official stamp was on his ballot, in the position in which the law apparently required it to be, and so folded that ballot as to have the inscription in view, he had discharged that duty; and that the act of the election official thereafter in removing not only the stub but also the official stamp should not be permitted to render his ballot worthless. At the time of counting the ballots, the judges had the identified ballots before them and had at hand the means of identification, removed from the ballot through their mistaken construction of the law.

The ballots from Gilman precinct should have been counted; to hold otherwise would be to render the statute an instrument of the injustice it was intended to prevent. If, by stamping the official designation on the stub above an almost indiscernible perforation but in the apparent position required by law—thus lulling the elector into fancied security—the ballot may be thereafter rendered null and void by removing the stub, concerted action of two unscrupulous judges of election (that is,

the one designated to give out and the one designated to receive the ballots) could easily nullify the action of an adverse precinct and defeat the popular will in an election.

The judgment is reversed and the cause is remanded to the district court, with direction to enter judgment in favor of appellant (contestee) confirming her title to the office in question.

Reversed and remanded.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

Rehearing denied April 18, 1917.

MONTANA RANCHES CO., APPELLANT, v. DOLAN ET AL.,
RESPONDENTS.

(No. 3,946.)

(Submitted March 17, 1917. Decided March 26, 1917.)

[164 Pac. 306.]

Receivers—Discretion—Burden of Proof—Complaint—Insufficiency.

Receivers—Appointment—Exercise of Power.

1. Under section 6698, Revised Codes, the power to appoint a receiver is to be exercised sparingly and with unusual caution, and only to prevent manifest wrong imminently impending, or where there is no other plain, speedy or adequate remedy.

[As to when it is proper to appoint a receiver, see note in 72 Am. St. Rep. 29.]

Same—Discretion—Burden of Proof.

2. An application for the appointment of a receiver is addressed to the sound legal discretion of the trial court; the burden of showing abuse of such discretion being upon appellant.

Same—Necessity of Appointment.

3. Since the remedy by receivership is one never to be allowed except upon a showing of necessity therefor, appellant had the burden of showing such necessity.

Same—Complaint—Insufficiency.

4. An allegation expressive of fear that crops sought to be placed in charge of a receiver might be removed and sold to innocent purchasers, was not a statement of fact justifying the district court to grant the relief asked for.

Same—Other Remedies Available.

5. Where injunction would have prevented the threatened sale of crops before severance from the soil, and claim and delivery would have defeated the same purpose after severance, receivership was properly denied.

Appeal from District Court, Lewis and Clark County; R. Lee Word, Judge.

ACTION by the Montana Ranches Company against Thomas J. Dolan and wife. From an order denying application for the appointment of a receiver, plaintiff appeals. Affirmed.

Messrs. Wight & Pew, for Appellant, submitted a brief; *Mr. Chas. E. Pew* argued the cause orally.

All the cases which we find which deal with a state of facts similar to that involved in this case hold that the plaintiff is entitled to the appointment of a receiver. In *Corcoran v. Doll*, 35 Cal. 476, a receiver was appointed to take charge of growing crops. (High on Receivers, 2d ed., secs. 609–613; *Stuyvesant v. Grissler*, 12 Abb. Pr. (n. s.) 6; *Ireland v. Nichols*, 37 How. Pr. 222, 31 N. Y. Sup. Ct. 208; *Battle v. Davis*, 66 N. C. 252; *Countee v. Armstrong*, 8 Ohio Dec. 531.) In *McCasslin v. State*, 44 Ind. 151, the court also held: "Where a vendee in possession under a contract of sale is insolvent, and has committed waste, and threatens to cut down and remove timber, the court may appoint a receiver to take possession of the land, in a suit for the purchase money." The principle of these cases is applicable to the case at bar.

The rights of the plaintiff stand admitted. A notice of the forfeiture was given, a demand for possession was made and refused, and upon such refusal a suit was instituted for the purpose of canceling the contract and recovering possession, all in February, 1916, long prior to the sowing of any crops. The ownership of the crops went with the ownership of the land, subject to the rights of contract existing between the plaintiff and such owner. *Prima facie*, therefore, the plaintiff is entitled to these crops, and this action being an action in equity, it was

the duty of the court to overrule the demurrer, unless defendants' answer discloses a *bona fide* claim of ownership or right of possession. (*Schmidt v. Williams*, 72 Iowa, 317, 33 N. W. 693; *Woody v. Wagner*, 89 Wash. 429, 154 Pac. 819; *Rowell v. Klein*, 44 Ind. 290, 15 Am. Rep. 235.) In the case of *Samson v. Rose*, 65 N. Y. 411, the court held that one who sowed a crop upon the property as to which an action in ejectment was pending did so at his peril, and that the title to the crops upon the termination of the action in favor of the plaintiff reverted to the plaintiff. (*De Bow v. Colfax*, 10 N. J. L. 128.) The court below rested its decision upon the following cases, which we contend are readily distinguishable: *Churchill v. Ackerman*, 22 Wash. 227, 60 Pac. 406; *Stockwell v. Phelps*, 34 N. Y. 363, 90 Am. Dec. 710; *Roney v. H. S. Halvorson Co.*, 29 N. D. 13, 149 N. W. 688; *Lynch v. Sprague Roller Mills*, 51 Wash. 535, 99 Pac. 578.

Mr. Odell W. McConnell, for Respondents, submitted a brief and argued the cause orally.

- The suit between the appellant and the defendants is still pending and undetermined. The appellant cannot anticipate the result of the litigation and assume that it is entitled to the possession of the lands by having a receiver appointed and put in possession. "The occupier of land is the owner of all crops harvested during the term of his occupancy, whether the occupier be a purchaser, in possession, or a mere trespasser, in possession, holding adversely." (*Lynch v. Sprague Roller Mills*, 51 Wash. 535, 99 Pac. 578; *Churchill v. Ackerman*, 22 Wash. 227, 60 Pac. 406; *Clarke v. Clyde*, 25 Wash. 661, 66 Pac. 46; 24 Cyc. 1469.) In *Stockwell v. Phelps*, 34 N. Y. 363, 90 Am. Dec. 710, it was held that when a party in possession of lands, claiming adversely to all others, sells to a third party the hay cut therefrom during such occupancy, the legal title thereto passes to his vendee, as against the party claiming title to said premises, although not in possession. (See, also, *Brothers v. Hurdle*, 10 Ired. (32 N. C.) 490, 51 Am. Dec. 400;

Dollar v. Roddenbery, 97 Ga. 148, 25 S. E. 410; *Hinton v. Walston*, 115 N. C. 7, 20 S. E. 164; *Page v. Fowler*, 39 Cal. 412, 2 Am. Rep. 462.) "Where A sows, cultivates and harvests a crop on B's land, he is entitled to the crop as against B, if he does not abandon the crop before harvest, and this whether he is in possession lawfully or unlawfully." (*Adams v. Leip*, 71 Mo. 597; *Hinton v. Walston*, 115 N. C. 7, 20 S. E. 164; *Martin v. Thompson*, 62 Cal. 618, 45 Am. Rep. 663; *Faulcon v. Johnston*, 102 N. C. 264, 11 Am. St. Rep. 737, 9 S. E. 394.) A case practically identical with the case at bar is that of *Roney v. H. S. Halvorson Co.*, 29 N. D. 13, 149 N. W. 688.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In February, 1916, an action was commenced in the district court of Lewis and Clark county, the primary purposes of which were to secure the cancellation of a certain contract for the sale of real estate and the restitution of possession. In July following, and before a demurrer to the complaint had been disposed of, the plaintiff applied to the court for the appointment of a receiver. The application was denied and plaintiff has appealed from the order.

From the complaint we gain the following information: In May, 1914, the Montana Ranches Company, then having a right to sell a certain tract of land in Lewis and Clark county, entered into an agreement to sell the same and certain personal property to defendants for a stipulated price, a part of which was paid and the balance of which was to be paid in installments. Time was made of the essence of the agreement, and a provision was incorporated therein to the effect that if defendants failed to make any payment when due, the plaintiff at its option might declare the contract terminated, and thereupon all sums previously paid should be forfeited to the plaintiff, all rights of the defendants should immediately cease, and defendants should yield up possession to plaintiff. Under this agreement, defendants were let into possession of the premises about March 1, 1915,

and have since retained possession. On December 1, 1915, an installment of the purchase price, with interest, became due, but defendants failed to pay the same or any part, and in February, 1916, plaintiff notified defendants that it elected to exercise the option reserved to it in the contract, declared the contract forfeited, and demanded possession, which was refused. In the application for the appointment of a receiver, plaintiff alleges that it commenced the action above referred to, repeats the material allegations of its complaint, and then sets forth that the defendants are insolvent; that they are in the possession of the premises in controversy; that they are farming the same as their own; "that there are large quantities of alfalfa and other grasses growing upon said lands, as well as cultivated crops of great value; that there is danger that said crops will, if relief is not granted petitioner as hereinafter prayed, be removed and sold to innocent purchasers and the proceeds converted to the use of defendants, or that said crops will be consumed by defendants and converted to their own use; that the value of said crops is upwards of \$1,500."

It is the contention of appellant that at the time its application was denied, the material allegations of its complaint were admitted by the demurrer interposed by defendants, and that, since plaintiff had exercised its option, had declared the contract forfeited, had notified defendants, and had demanded possession, all rights of defendants in or to the property were *prima facie* terminated, the title restored to plaintiff, and with it the right to immediate possession; that the ownership of the crops followed the ownership of the land, and therefore plaintiff was *prima facie* the owner of the crops. For the purpose of argument only, we will assume that these premises are correct; that as between plaintiff and defendants, the plaintiff was the owner and entitled to the possession of the land immediately upon giving notice of forfeiture, and that title to the crops then growing or afterward planted, followed the title and right of possession in plaintiff, and that, at the time this application was made,

the crops had not matured or at least had not been severed from the soil.

The authority to appoint a receiver is conferred by section 6698, Revised Codes, but only in the instances therein enumerated. The present application does not bring the proceeding within any of the designated classes, unless it be the last one, *viz.*: "In all other cases where receivers have heretofore been appointed by the usages of courts of equity." The power to [1] invoke the extraordinary remedy by which property is taken into the possession of the court is to be exercised sparingly, with unusual caution, and only to prevent manifest wrong imminently impending, or where the case shows clearly that the complaining party is in danger of suffering irreparable loss and there is no other plain, speedy or adequate remedy. Where the application is made, as in this instance, before a decision adjudging the title to be in the applicant, the appointment, if made, amounts in effect to a levy of an execution *in limine*, entailing costs, expenses and other hardships often out of proportion to the value of the property right sought to be protected. (*Hickey v. Parrot S. & C. Co.*, 25 Mont. 164, 64 Pac. 330.) Because of the extraordinary harshness of the remedy, courts of equity have ever been reluctant to apply it. If the applicant has any other adequate remedy, the application will be denied.

The record before us discloses that the application was filed in the district court on July 7, 1916; that on July 17 an order to show cause was issued; that on July 29 the application and defendants' objections thereto were submitted; and that the order [2] denying the application was made on October 9. The application was addressed to the sound, legal discretion of the trial court (*Hartnett v. St. Louis M. & M. Co.*, 51 Mont. 395, 153 Pac. 437), and plaintiff must assume the burden of showing an abuse of such discretion. Since the remedy by receivership [3] is an extraordinary one, never to be allowed except upon a showing of necessity therefor (*Prudential Securities Co. v. Three Forks etc. R. Co.*, 49 Mont. 567, 144 Pac. 158), the plaintiff was further charged with the burden of presenting facts

sufficient to disclose to the court the existence of such necessity. (34 Cyc. 112.) All that was presented to the court below to [4] show such an exigency as would call for relief is contained in the portion of the application quoted above: "That there is danger that said crops will * * * be removed and sold to innocent purchasers and the proceeds converted to the use of defendants, or that said crops will be consumed by defendants." The expression of a fear is not the statement of a fact. It is not alleged that defendants threaten or intend to dispose of the crops in any manner, or that they will be disposed of, or that loss or waste will result from defendants' possession or control of them. It is not shown that defendants are not farming in a good workmanlike manner, or not intent upon the proper care and preservation of the crops. Indeed, we think there is not stated any fact from which the court could determine that plaintiff was in imminent peril of losing whatever interest it might have in the property.

If the property was not disposed of before the crops were [5] severed from the soil and became personal property, then claim and delivery would afford to plaintiff a plain, speedy, and adequate remedy. If the defendants threatened to dispose of the crops before severance, an injunction would defeat such purpose, and in either event a receiver would be unnecessary. We think plaintiff has failed to show such abuse of discretion as would warrant a reversal of the order.

The order is affirmed.

Affirmed.

MR. JUSTICE SANNER concurs.

MR. CHIEF JUSTICE BRANTLY, being absent, did not hear the argument, and takes no part in the foregoing decision.

DOTY, APPELLANT, v. REECE, RESPONDENT.

(No. 3,988.)

(Submitted March 17, 1917. Decided March 27, 1917.)

[164 Pac. 542.]

*Election Contest—Attorney's Fee—Constitution—Appeal and Error.***Election Contest—Attorney's Fee—Discretion.**

1. Under sections 48 and 49 of the Corrupt Practices Act (Laws 1913, pp. 612, 613), the prevailing party in an election contest, be he petitioner or respondent, is entitled to attorneys' fees in addition to his other costs and disbursements, the amount to be awarded in that behalf resting upon the sound discretion of the trial court.

[As to "expenses" as including counsel fees, see note in *Ann. Cas.* 1914C, 1300.]

Same—Attorney's Fee—Statute—Constitutionality.

2. *Held*, that sections 48 and 49 of the Corrupt Practices Act, awarding the successful party in an election contest attorney's fees, etc., are not open to constitutional objections that they deny to the unsuccessful one the equal protection of the laws, grant to the former a special privilege not enjoyed by successful litigants in other cases, violate the provision that justice shall be administered without sale, denial or delay, and constitute an attempt to delegate legislative power to the courts.

Same—Appeal and Error—Assigning Error for Party not Appealing.

3. Appellant (petitioner) in an election contest was not in a position to raise the point that, because the sureties on the bond required of him before instituting the proceeding were not given their day in court previous to granting his opponent attorneys' fees, the award was not warranted.

Appeal from First Judicial District Court, Lewis and Clark County; R. Lee Word, Judge.

ELECTION CONTEST by Martin Doty against Frank L. Reece. From a judgment dismissing the contest and awarding contestee an attorney's fee, contestant appeals. Affirmed.

Mr. C. A. Spaulding and *Mr. J. R. Wine*, for Appellant, submitted a brief; *Mr. Spaulding* argued the cause orally.

The statute in question is violative of section 1 of the Fourteenth Amendment of the Constitution of the United States, in that it denies to litigants in other classes of cases, as well as the penalized litigant in election contest cases, the equal protection of the law. It is likewise violative of section 26 of Article V

of the Constitution of Montana, in that it grants to successful litigants in election contest cases a special privilege not enjoyed by successful litigants in other classes of litigation. This is not a matter of first impression here. This court in the case of *Mills v. Olsen*, 43 Mont. 129, 115 Pac. 33, tacitly held invalid section 7166 of the Revised Codes of Montana, providing for attorney's fees upon the foreclosure of a mechanic's lien. In doing so this court had occasion to remark that the reasoning of the many cases holding similar statutes unconstitutional "is unanswerable," and so it is. That legislation of this kind is violative of the constitutional principles above adverted to, see *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. Ed. 666, 17 Sup. Ct. Rep. 255; *Builders' Supply Depot v. O'Connor*, 150 Cal. 265, 119 Am. St. Rep. 193, 11 Ann. Cas. 712, 17 L. R. A. (n. s.) 909, 88 Pac. 982; *Stimson Mill Co. v. Nolan*, 5 Cal. App. 754, 91 Pac. 262; *Merced Lumber Co. v. Bruschi*, 152 Cal. 372, 92 Pac. 844; *Hill v. Clark*, 7 Cal. App. 609, 95 Pac. 382; *Farnham v. California etc. Trust Co.*, 8 Cal. App. 266, 96 Pac. 788; *Los Angeles etc. Brick Co. v. Higgins*, 8 Cal. App. 514, 97 Pac. 414, 418, 420; *State v. Cudahy Packing Co.*, 33 Mont. 179, 114 Am. St. Rep. 804, 8 Ann. Cas. 717, 82 Pac. 833; *Hotchkiss v. Marion*, 12 Mont. 218, 29 Pac. 821; *Ex parte Sohncke*, 148 Cal. 262, 113 Am. St. Rep. 236, 7 Ann. Cas. 475, 2 L. R. A. (n. s.) 813, 82 Pac. 956; *Rodge v. Kelly*, 88 Miss. 209, 117 Am. St. Rep. 733, 11 L. R. A. (n. s.) 635, 40 South. 552; *State ex rel. Garrabad v. Dering*, 84 Wis. 585, 36 Am. St. Rep. 948, 19 L. R. A. 858, 54 N. W. 1104; *Union County Bank v. Ozan Lumber Co.*, 127 Fed. 206; *Kellyville Coal Co. v. Harrier*, 207 Ill. 624, 99 Am. St. Rep. 240, 69 N. E. 927; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. Ed. 220, 6 Sup. Ct. Rep. 1064; *Cotting v. Godard*, 183 U. S. 79, 46 L. Ed. 92, 22 Sup. Ct. Rep. 30; *May v. People*, 1 Colo. App. 157, 27 Pac. 1010; *State v. Hinman*, 65 N. H. 103, 23 Am. St. Rep. 22, 18 Atl. 194; *Hayes v. Missouri*, 120 U. S. 68, 30 L. Ed. 578, 7 Sup. Ct. Rep. 350; *City of Spokane v. Macho*, 51 Wash. 322, 130 Am. St. Rep. 1100, 21 L. R. A. (n. s.) 263,

98 Pac. 755; *Town of Fulton v. Norteman*, 60 W. Va. 562, 9 L. R. A. (n. s.) 1196, 55 S. E. 658.

This statute is also violative of section 6 of Article III of the Constitution of Montana. (*Davidson v. Jennings*, 27 Colo. 187, 83 Am. St. Rep. 49, 48 L. R. A. 340, 60 Pac. 354; *Wilder v. Chicago & W. M. Ry. Co.*, 70 Mich. 382, 38 N. W. 289; *Schut v. Chicago & W. M. Ry. Co.*, 70 Mich. 433, 38 N. W. 291; *Rinear v. Grand Rapids & I. R. Co.*, 70 Mich. 620, 38 N. W. 599.)

The statute under consideration is likewise invalid by reason of its delegation of legislative authority. (*State v. Holland*, 37 Mont. 393; *State v. Great Northern R. Co.*, 100 Minn. 445, 10 L. R. A. (n. s.) 250, 111 N. W. 289; Cooley's Constitutional Limitations, 6th ed., p. 137; *Anderson v. Manchester Fire Assur. Co.*, 59 Minn. 182, 50 Am. St. Rep. 400, 28 L. R. A. 609, 60 N. W. 1095, 63 N. W. 241; *O'Neil v. American Fire Ins. Co.*, 166 Pa. 72, 45 Am. St. Rep. 650, 26 L. R. A. 715, 30 Atl. 945.) "Except where authorized by the Constitution, as in respect to municipalities, the legislature cannot delegate legislative power to determine what shall be the law. The legislature only must determine what it shall be." (*State ex rel. Hahn v. Young*, 29 Minn. 474, 9 N. W. 737.)

Mr. C. E. Pew, Mr. Henry C. Smith and Mr. Ed. Phelan, for Respondent, submitted a brief; *Mr. Pew and Mr. Phelan* argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

At the last general election, the appellant and the respondent were rival candidates for the office of clerk of the district court in and for Lewis and Clark county. Upon the final canvass the respondent was declared elected, and the appellant brought this proceeding to contest the result so declared. He failed to sustain his contest, and the court in its judgment, dismissing the same, awarded to the respondent \$200 as attorney's fees. The purpose of this appeal is to raise the question whether such award was warranted, and the appellant's claim is that it was

not, because: (a) There is no statute authorizing it; (b) if there is any such statute, the same is unconstitutional; (c) the award was made as against appellant's sureties without giving them a day in court.

(a) This proceeding was brought under what is commonly [1] called the Corrupt Practices Act, passed by the people at the general election of 1912 (Session Laws 1913, p. 593 *et seq.*), which provides, among other things, for contesting elections. Section 48 of this enactment is, in part, as follows: "Any petition contesting the right of any person to a nomination or election shall set forth the name of every person whose election is contested, and the grounds of the contest. * * * Before any proceeding thereon the petitioner shall give bond to the state in such sum as the court may order, * * * conditioned to pay all costs, disbursements and attorney's fees that may be awarded against him if he shall not prevail. If the petitioner prevails, he may recover his costs, disbursements and reasonable attorney's fees against the contestee. But costs, disbursements and attorney's fees, in all such cases, shall be in the discretion of the court, and in case judgment is rendered against the petitioner it shall also be rendered against the sureties on the bond. * * * " Section 49 also provides: " * * * If more than one petition is pending, or the election of more than one person is contested, the court may, in its discretion, order the cases to be heard together, and may apportion the costs, disbursements and attorneys' fees between them. * * * " We think the clear implication of these provisions is that the prevailing party, whether a petitioner or respondent, shall be entitled to attorney's fees in addition to his other costs and disbursements, the amount to be awarded in that behalf to stand upon the sound discretion of the court. The language employed is not precise, but the greater part of it would have to be ignored to justify any other conclusion.

(b) This being their effect, can these provisions be upheld? [2] Appellant insists they cannot for these reasons: They subject the unsuccessful party in an election contest to a penalty

not visited upon other unsuccessful litigants, and therefore deny to him the equal protection of the laws guaranteed by section 1 of the Fourteenth Amendment to the federal Constitution; they grant to the successful party in an election contest a special privilege not enjoyed by successful litigants in other cases, contrary to section 26, Article V, of the state Constitution; they are violative of section 6, Article III, of the state Constitution, which provides that the courts of this state shall be open to every person and that justice shall be administered without sale, denial or delay; and they constitute an attempt to delegate legislative power and authority to the courts.

To support the first two of these specifications, counsel rely upon *Mills v. Olsen*, 43 Mont. 129, 115 Pac. 33, and a number of cases from other jurisdictions referred to in that decision and cited in the brief of appellant here. In *Mills v. Olsen*, the constitutionality of section 7166, Revised Codes, authorizing an award of attorney's fees to the successful claimant under a mechanic's lien, was challenged; but this court, without express discussion or decision of the question, contented itself with approval of the reasoning of the authorities referred to. Typical of these authorities, and in fact the controlling case, is *Gulf, C. & S. F. Ry. Co. v. Ellis*, 165 U. S. 150, 41 L. Ed. 666, 17 Sup. Ct. Rep. 255, wherein a Texas statute authorizing the successful claimant of certain causes of action against railroad companies, to recover attorneys' fees, was annulled as a denial of the equal protection of the laws. The grounds of this decision are thus interestingly stated: "It is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. No individuals are thus punished, and no other corporations. The Act singles out a certain class of debtors and punishes them when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts as other litigants under like conditions and with like protection. If litigation terminates adversely to them, they are mulcted in the attorneys' fees of the successful plaintiff; if it terminates in their favor, they recover.

no attorneys' fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorneys' fees if wrong; they do not recover any if right; while their adversaries recover if right and pay nothing if wrong. In the suits, therefore, to which they are parties, they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection. * * * It is, of course, proper that every debtor should pay his debts, and there might be no impropriety in giving to every successful suitor attorneys' fees. Such a provision would bear a reasonable relation to the delinquency of the debtor, and would certainly create no inequality of right or protection." In our opinion, there is not the slightest analogy between the statute so incisively analyzed and the statute before us. The statute before us applies to all election contests, it treats the adverse parties thereto alike, and, if it would be proper to give attorneys' fees to every successful litigant in actions to recover money, it is equally so to give attorneys' fees to every successful litigant in actions brought to contest elections.

The appeal to section 26, Article V, of the state Constitution, is also without merit. The provision there is: "The legislative assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * Granting to any corporation, association or individual the right to lay down railroad tracks, or any special or exclusive privilege, immunity or franchise whatever." The Act before us does not grant or attempt to grant to any particular corporation, association or individual any special or exclusive privilege or immunity; it is a general law applicable alike to all persons within a class, and the provision invoked has nothing to do with it. Doubt no longer exists touching the right of the state through its legislature to classify, so long as such classification rests upon some difference which bears a reasonable and just relation to the matter in respect to which the classification is proposed (*Gulf etc. Ry. Co. v. Ellis, supra; Hill v. Rae, 52 Mont. 378,*

et cit., 158 Pac. 826); and we think that election contests not only form a perfect class for special treatment because of their intimate relation to a matter of great public concern, but they also present special reasons for the particular discrimination here involved.

Nor does section 6 of Article III of the state Constitution afford any objection to the award in question. In *Wortman v. Kleinschmidt*, 12 Mont. 316, 30 Pac. 280, a similar criticism was leveled at the statute allowing attorneys' fees to claimants under mechanics' liens; but it was held to be unavailing. True, the later case of *Mills v. Olsen*—accepting it as decisive—overturned a similar statute, but the reasoning invoked had to do with the guaranty of the equal protection of the laws. As a decision against the application of section 6, Article III, *Wortman v. Kleinschmidt* is still in effect.

The argument against the statute as delegating to the courts the power to say when attorneys' fees may and when they may not be allowed in election contests, falls to the ground in view of the conclusion above announced that the discretion of the court goes only to the amount which shall be allowed in each instance.

(c) Appellant is not in position to complain that his sureties [3] have not had their day in court. As long as they have not appealed and are apparently satisfied, their situation is no concern of his.

The judgment is affirmed.

'Affirmed.

MR. JUSTICE HOLLOWAY concurs.

MR. CHIEF JUSTICE BRANTLY, being absent, did not hear the argument and takes no part in the above decision.

Rehearing denied April 23, 1917.

HAWLEY, APPELLANT, v. CITY OF BUTTE, RESPONDENT.

(No. 3,986.)

(Submitted March 16, 1917. Decided March 29, 1917.)

[164 Pac. 305.]

*Cities and Towns—Special Improvement Districts—Protests—
Right to Withdraw.*

1. A property owner in a city who has signed a protest against the creation of a special improvement district may, within the time allowed for presenting such protest, withdraw therefrom and thus defeat the protest.

[As to remedies of taxpayers for illegal corporate acts, see note in 2 Am. St. Rep. 92.]

Appeal from District Court, Silver Bow County; J. B. McClernan, Judge.

ACTION by Anna E. Hawley against the City of Butte for an injunction. Judgment for defendant, and plaintiff appeals. Affirmed.

Mr. W. E. Carroll, for Appellant, submitted a brief.

Mr. John A. Groeneveld, *Mr. Thos. D. Long*, *Mr. Louis F. Lorenz*, *Mr. Fred J. Furman* and *Mr. N. A. Rotering*, for Respondent, submitted a brief; *Mr. Groeneveld* and *Mr. Rotering* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The city of Butte undertook to create a special improvement district for paving and other purposes. Within the time allowed by statute a protest was filed with the city clerk by persons owning more than 50 per cent of the real estate included within the proposed district. On the day following and within the same period certain of the persons who signed the protest notified the council in writing that they withdrew their objections to the creation of the district. When the council came to consider the

subject, it eliminated the withdrawals from the protest and found that the protest, as thus changed, contained the signatures of the owners of only 46 per cent of the area embraced within the proposed district, and was therefore insufficient. It passed a resolution creating the district and directed the clerk to advertise for bids, and this suit was then instituted by one of the protestants to enjoin the city from proceeding further. The cause was submitted for decision upon an agreed statement of facts. The trial court found for defendant and plaintiff appealed.

In the agreed statement counsel for the respective parties submitted to the court but a single question: May a property [1] owner who has signed a protest against the creation of a special improvement district within the period allowed for presenting such protest withdraw therefrom and thereby defeat the protest? It was conceded by both parties that, if the withdrawals were not properly allowed, the protest was sufficient to defeat the project, whereas, if the withdrawals were properly allowed, the council correctly held the protest insufficient.

The statutes governing the creation of special improvement districts in cities and towns (Chap. 89, Laws 1913, as amended by Chap. 142, Laws 1915), provide for a resolution by the city council expressing its intention to create the district in contemplation and for notice to everyone having property within the proposed district. Within fifteen days after the first publication of the notice, any owner of property liable to assessment for the work may make protest in writing and file such protest with the city clerk. At the next regular meeting of the council after the expiration of the time for filing protests the council shall hear and pass upon all protests. If no protests are filed, or if protests are filed which are found to be insufficient or are overruled or denied, "immediately thereupon the city council shall be deemed to have acquired jurisdiction to order the proposed improvement." There is not any provision in the statute which in terms authorizes one who has signed a protest to withdraw therefrom, but the legislature has seen fit to refer the

question of the propriety of creating a special improvement district to the owners of the majority of the property responsible for the cost of the improvement. This right to protest is simply the right to petition—the right to express the will of the property owner affected by the improvement. In the exercise of its authority over the subject, the legislature has limited the time within which such property owner may express his dissent, but within that limited time he is allowed the utmost liberality for the expression of his views, and it is not until the full period thus allowed him has expired that he is foreclosed from making known his final decision. So long as the subject is referred to him and he is invited by the notice to express his disapproval, if any such he has, he should be held to be free to make known his views or to change them, if he acts within the time allowed by law.

Our statute is somewhat peculiar, in that jurisdiction to proceed with the improvement is not conferred upon the city until it has first determined that a sufficient protest is not before it. The right to petition implies the right to withdraw from a petition (*State ex rel. Lang v. Furnish*, 48 Mont. 28, 134 Pac. 297; *State ex rel. Fadness v. Eie*, ante, p. 138, 162 Pac. 164); and since it is the obvious purpose of this legislation to permit the owners of a majority of the property affected to determine the propriety of the improvement, that purpose is best subserved by a liberal interpretation of the statute in favor of those directly interested, if they act within the time fixed by the statute or acquiesce for that period. These views are supported by the better reasoning and by the decided weight of authority. The subject is treated thoroughly and the decided cases reviewed in *Sedalia v. Montgomery*, 227 Mo. 1, 127 S. W. 50.

Neither do these views conflict in the least with the authorities which hold that, if the statute itself confers jurisdiction upon the council which is subject to be defeated by filing a protest signed by the owners of a majority of the property affected, then the withdrawal of names from such a protest sufficient in the first instance to oust jurisdiction cannot have the effect of

reinvesting in the council the jurisdiction lost when the protest was filed. By the express terms of our statute jurisdiction does not attach until the council finds that a sufficient protest is not before it, and therefore the withdrawal of names from the protest before the time for filing such protest has expired does not affect the question of jurisdiction. Though its exercise may occasion disappointment to the remaining protestants, the right to withdraw cannot be denied. When the time for the presentation of protests expired, the owners of less than one-half of the property affected were objecting to the improvement, and the council properly determined that such protest was insufficient.

The judgment is affirmed.

'Affirmed.

MR. JUSTICE SANNER concurs.

MR. CHIEF JUSTICE BRANTLY, being absent, did not hear the argument, and takes no part in the foregoing decision.

NATIONAL BANK OF GALLATIN VALLEY, APPELLANT, v.
INGLE ET AL., DEFENDANTS; WIRAK ET AL., RESPONDENTS.

(No. 3,744.)

(Submitted March 21, 1917. Decided March 31, 1917.)

[164 Pac. 535.]

Contracts — Construction — Chattel Mortgages — Innocent Purchaser — Estoppel.

Contracts—Lease of Sheep—Construction by Parties.

1. Where the parties to a lease of a band of sheep construed the contract so as to express their intentions and acted in accordance therewith, the court will adopt the construction they placed upon it as to which party had title to lambs sold by the lessee.

Same—Chattel Mortgages—Priority—Lessor's Lien.

2. Where a band of sheep was leased, the lessee to receive half the wool and lambs, and the latter mortgaged the lambs, and, when the division of lambs between lessor and lessee took place, the lessor had notice of the mortgage, but consented to the division, he waived his

lien; so that when the lessee directed the purchaser of his share of the lambs to pay the money to a bank, the direction constituted a verbal assignment, upon which the bank could maintain its action.

[As to priority of lien as between chattel mortgagee and livery-stable keeper, see note in *Ann. Cas.* 1914B, 316.]

Same—Rights of Third Persons—"Innocent Purchaser."

3. An "innocent purchaser" is one who pays or obligates himself to pay the full purchase price of mortgaged property to the vendor, with no notice of any claim or right to the property in another.

Estoppel—Right to Assert.

4. A party who was not misled to his prejudice by anything done by his adversary is not in a position to assert estoppel.

Appeals from District Court, Sweet Grass County; Albert P. Stark, Judge.

ACTION by the National Bank of Gallatin Valley against Ernest Ingle and others. From a judgment denying plaintiff any relief as against defendant Parham, and from an order refusing a new trial, plaintiff appeals. Judgment and order reversed and cause remanded, with directions to enter judgment for plaintiff against defendant Parham.

Mr. George Y. Patten, for Appellant, submitted a brief and argued the cause orally.

The protection given to an innocent purchaser as against a mortgage of which he had no knowledge rests upon the principle that a man ought not to be prejudiced in his rights by facts which he did not know, and which it cannot be said that he ought to have known; that as a purchaser he has parted with value in ignorance of facts which otherwise would defeat his claim; and that a contrary rule would make it impossible for men to engage in trade, because the purchaser would always be in danger of losing what he had purchased through secret claims and encumbrances, even though he had acted with care and in perfect good faith. It is only the purchaser who has parted with value who is within the rule, and who is thus protected as an innocent purchaser, because until he has parted with the purchase price, he does not need the protection which the rule affords. If he has knowledge of the mortgage before he receives the property, he is not within the rule, because the danger being known, he acts

at his peril. The innocent purchasers whom the law so jealously guards are not those who are indemnified. Purchasers without notice are not entitled to protection further than as they have actually paid consideration. (*Warner v. Whittaker*, 6 Mich. 133, 72 Am. Dec. 65; *Everts v. Agnes*, 4 Wis. 343, 65 Am. Dec. 314; *Matson v. Melchor*, 42 Mich. 477, 481, 4 N. W. 200; *Wynn v. Carter*, 20 Wis. 107; *Wells v. Smith*, 2 Utah, 39, 52; *Roberts v. W. H. Hughes Co.*, 86 Vt. 76, 83 Atl. 807.)

A mortgagee may join as a defendant in an action to foreclose his chattel mortgage one who has purchased any of the mortgaged property, and may have a personal judgment against such purchaser if he has disposed of the mortgaged property after purchasing it. (7 Cyc. 102.) In the case of *McDaniel v. Chinski*, 23 Tex. Civ. App. 504, 57 S. W. 922, it is held that it is not error to join as a party defendant one who has received from the mortgagors a part of the mortgaged property and converted it to his own use, since if he has disposed of the property, a personal judgment may be entered against him.

To the same effect are *Reynolds v. Fitzpatrick*, 23 Mont. 52, 57 Pac. 452; *Cone v. Iverson*, 4 Wyo. 203, 33 Pac. 31, 35 Pac. 933; *Alter v. Bank of Stockham*, 53 Neb. 223, 73 N. W. 667; *Dose v. Beatie*, 62 Or. 308, 123 Pac. 383; affirmed on rehearing, 125 Pac. 277; *Haynes & Bro. v. W. O. Gray & Co.*, 148 Ala. 663, 41 South. 615; *Gray v. Haynes & Bro.*, 164 Ala. 294, 51 South. 416; *Burchinell v. Koon*, 25 Colo. 59, 52 Pac. 1100; *Grainger v. Lindsay*, 123 N. C. 216, 31 S. E. 473; *Donovan v. St. Anthony & D. Elevator Co.*, 7 N. D. 513, 66 Am. St. Rep. 674, 75 N. W. 809; *Buffalo Pitts Co. v. Stringfellow-Hume Hdw. Co.*, 61 Tex. Civ. App. 49, 129 S. W. 1161; *State Nat. Bank v. Cudahy Packing Co.*, 126 Fed. 543; *Wilkes v. Southern Ry.*, 85 S. C. 346, 137 Am. St. Rep. 890, 21 Ann. Cas. 79, 67 S. E. 292.

Mr. John E. Barbour and *Mr. F. B. Reynolds*, for Respondents, submitted a brief; *Mr. Reynolds* argued the cause orally.

“Where a mortgagee authorizes the mortgagor, as his agent, to sell mortgaged property and to deposit the proceeds in a bank

to be applied on the mortgage debt, the lien of the mortgage does not attach to the proceeds." (5 R. C. L., "Chattel Mortgages," sec. 79.) "A purchaser from a mortgagor takes the title free from the lien of the mortgage if the sale was made with the express or implied consent of the mortgagee." (7 Cyc. 47; *Ziegler v. Ilfeld*, 52 Colo. 275, Ann. Cas. 1913D, 583, 122 Pac. 56; *Brandt v. Daniels*, 45 Ill. 453; *Farmer v. Bank of Graettinger*, 130 Iowa, 469, 107 N. W. 170; *Carter v. Fately*, 67 Ind. 427; *Maier v. Freeman*, 112 Cal. 8, 53 Am. St. Rep. 151, 44 Pac. 357; *Benedict v. Farlow*, 1 Ind. App. 160, 27 N. E. 307; *Clark v. Hale*, 8 Gray (74 Mass.), 187; *White Mountain Bank v. West*, 46 Me. 15, 20; *First Nat. Bank of Marquette v. Weed*, 89 Mich. 357, 50 N. W. 864; *Partridge v. Minnesota etc. Elevator Co.*, 75 Minn. 496, 78 N. W. 85; *Lafayette County Bank v. Metcalf*, 29 Mo. App. 384; *Drexel v. Murphy*, 59 Neb. 210, 80 N. W. 813; *Gage v. Whittier*, 17 N. H. 312; *Rider v. Powell*, 28 N. Y. 310; *Merritt v. Kitchen*, 121 N. C. 148, 28 S. E. 358; *Fleenniken v. Scruggs*, 15 S. C. 88; *Houston etc. R. Co. v. Garrison* (Tex. Civ.), 37 S. W. 971; *Adams v. Pease*, 113 Ill. App. 356.) The purchaser of the mortgaged chattels need not know when he makes the purchase that the mortgagee has consented to the sale. (*Livingston v. Stevens*, 122 Iowa, 62, 94 N. W. 925; *Knollin & Co. v. Jones*, 7 Idaho, 466, 63 Pac. 638; *Ziegler v. Ilfeld*, 52 Colo. 275, Ann. Cas. 1913D, 583, 122 Pac. 56; *Farmer v. Bank of Graettinger*, 130 Iowa, 469, 107 N. W. 170; *Maier v. Freeman*, 112 Cal. 8, 53 Am. St. Rep. 151, 44 Pac. 357; *Drexel v. Murphy*, 59 Neb. 210, 80 N. W. 813; *New England M. S. Co. v. Great Western Elevator Co.*, 6 N. D. 407, 71 N. W. 130.) So in case at bar, it being undisputed that Ingle was authorized by plaintiff to sell the lambs and account to it for the proceeds, the decree should be in favor of the respondent Parham. Such consent may be orally expressed. (Jones on Chattel Mortgages, pars. 465, 486; *Frick Co. v. Western Star Milling Co.*, 51 Kan. 370, 32 Pac. 1103; *Stafford v. Whitcomb*, 8 Allen (90 Mass.), 518; *Pratt v. Maynard*, 116 Mass. 388; *Roberts v. Crawford*, 54 N. H. 532.)

The fact that Parham sold and delivered the property in question to Bailey without notice or knowledge of the existence of the mortgage in question constitutes a complete bar to plaintiff's action. (*Reynolds v. Fitzpatrick*, 28 Mont. 170, 72 Pac. 510.)

In case at bar the sale to Parham was completed prior to the commencement of this suit, prior to the assertion by the bank of its right under the mortgage in question by any action or process, and prior to any attempt on its part to take possession of the lambs under the terms of its mortgage, and under the decision above cited, these facts are an absolute defense to plaintiff's alleged cause of action. It is well established that a party can maintain an action of conversion only when he is entitled to the possession of the property at the time of the alleged conversion or sale. (Jones on Chattel Mortgages, sec. 444; *Donovan v. St. Anthony & D. Elevator Co.*, 7 N. D. 513, 66 Am. St. Rep. 674, 75 N. W. 809; *Danley v. Rector*, 10 Ark. 211, 50 Am. Dec. 242; *Ames v. Palmer*, 42 Me. 197, 66 Am. Dec. 271; *Davidson v. Waldron*, 31 Ill. 120, 83 Am. Dec. 206; *Swenson v. Kleinschmidt*, 10 Mont. 473, 26 Pac. 198; *Tuttle v. Hardenberg*, 15 Mont. 219, 38 Pac. 1070; *Reynolds v. Fitzpatrick*, 23 Mont. 52, 57 Pac. 452.)

HONORABLE R. LEE McCULLOCH, a Judge of the Fourth Judicial District, sitting in place of the Chief Justice, delivered the opinion of the court.

This action was brought to recover on a promissory note executed and delivered by defendant Ingle to plaintiff, and to foreclose a chattel mortgage, given to secure the same. From the judgment, in so far as it denied plaintiff any relief as against defendant Parham, and from an order refusing a new trial, these appeals are prosecuted.

The plaintiff alleges that defendant Wirak leased a band of ewe sheep to defendant Ingle for a term of three years. Ingle was to perform certain services and pay certain expenses incident to the care of the flock, and, in payment and reimbursement therefor, to receive one-half the wool clip and one-half the lambs; the wool to be divided each year at the shearing-pens and the

lambs to be divided when weaned, on October 1 of each year; the title to the lambs to be in defendant Wirak until division was made as stipulated in the agreement. All shortage in the original stock was to be made good by Ingle at shearing time each year, by furnishing ewes of the age of those lost, or, at the option of Ingle, to replace such loss by giving three ewe lambs for every two ewes lost. At the end of the third year Ingle was to replace the original stock with ewes of a certain age, and the original stock was then to become the property of Ingle. At shearing time in 1912 (the third year) the original stock had been diminished to the extent of some 800 head, which Ingle was obliged to replace, but which he did not replace, then nor at any other time.

In January, 1912, Ingle executed and delivered the promissory note and the chattel mortgage sued upon, and the mortgage was duly filed for record. From the pleadings it appears that prior to October 1, 1912, defendant Parham contracted with defendant Wirak for the purchase of all the lambs belonging to the band of sheep in question; that Parham had knowledge at the time of the interests of Ingle in the lambs, but had no actual knowledge of the existence of the chattel mortgage at the time of the purchase by him of the lambs; that the lambs were delivered to Parham after October 1 and by him immediately delivered to one Bailey, to whom he had sold them; that after delivery of the lambs, and before Parham paid the purchase price, he was informed of the existence of plaintiff's chattel mortgage, and was directed by Ingle to pay the plaintiff the amount due him for his one-half of the lambs; that, owing to the failure of Ingle to replace the sheep missing from the band, Wirak demanded payment of all the money to him, and Parham paid it to Wirak, instead of to the bank.

The trial court found, along with other facts, that in the latter part of August, 1912, Wirak, with the consent of Ingle, contracted with Parham for the sale of the lambs, and at the same time informed Parham of Ingle's interest; that in the latter part of September Wirak was informed and had knowl-

edge and notice of plaintiff's chattel mortgage. Among its conclusions of law, the trial court declared that the sale of the lambs to Parham operated as and effected a division of the lambs as between Wirak and Ingle, and that each of them thereby became entitled to one-half of the proceeds of the sale; that the filing of the mortgage, owing to the indefinite description of the property did not impart notice to Parham; that the sale of the lambs from Wirak to Parham was completed when the delivery was made to Parham; that when Parham first learned of the mortgage he had sold and delivered the lambs to one Bailey, and that Ingle and Wirak were present at and knew of such sale and delivery; that Parham was not then in possession, nor had he any interest in them; that plaintiff, by its agent, Ingle, having consented to the sale and assisted in the delivery of the lambs to Parham without informing him of its mortgage, and not having given Parham notice of its claim prior to his sale and delivery of the lambs to Bailey, is estopped from asserting any claim against defendant Parham. Judgment was awarded against Ingle, but in favor of Parham. No judgment was sought against Wirak.

At the time Ingle executed and delivered the chattel mortgage to plaintiff, had he any interest in the increase of the flock that could be mortgaged?

The contract provided that the shortage of ewes was to be made good by replacement at shearing time; that the division of lambs was to take place on October 1, and that the title to the lambs was to remain in Wirak until the division of them was made. If the language of the contract were strictly construed, Ingle would have no title or interest in the lambs until October 1, even had he at shearing time made good all shortages occasioned by losses occurring in the original band during the previous year. From shearing time to October 1 Ingle would be compelled to care for a large band of lambs in which he had no interest. Notwithstanding the language of the contract to the effect that title was to remain in Wirak until division, the intention of the parties was evidently that Wirak was to have

a lien upon the lambs to secure the faithful performance by Ingle in the way of replacement of lost stock. Wirak alleges in his answer: "That it was the intention of said parties to said contract that the provision above mentioned, as to the title to said lambs remaining in defendant Louis L. Wirak until the same were divided, should stand as security to said Louis L. Wirak for the performance of the obligation of said Ernest Ingle assumed by him in said contract, including the obligation to make good the loss on the original stock as above mentioned; * * * that said plaintiff took said mortgage with full knowledge of the terms of said contract made and entered into by and between said Louis L. Wirak and Ernest Ingle, and did thereby take said mortgage subject to the equities of defendant Louis L. Wirak."

If the right Wirak was intended to have, and which he and Ingle understood he had, was a mere equity, to-wit, security for performance of Ingle's agreement to replace stock on account of losses, then the title to the lambs was not in Wirak, but, instead, he had a lien upon the lambs for the performance of that particular part of the contract, and Ingle had the title. Assuredly Wirak could not hold his own property as security for the performance of an obligation Ingle owed to him. He certainly so understood when he contracted with Parham for the sale of the lambs and informed Parham of Ingle's interest; and Ingle certainly so understood when he mortgaged his interest in the lambs [1] to plaintiff. The parties themselves having construed the contract so as to express their intentions, and having acted in accordance therewith, the court will adopt the construction they placed upon it.

Aside from this, the contract gave Ingle a certain interest in the original sheep, being the right not only to the possession and care of them, to the end that they might yield an increase from which he could receive pay for his services, but also the right to become owner of the original stock by substitution of other stock therefor. Title became vested in a particular one-half of the lambs or the proceeds thereof when, as the court concluded,

a division was effected by the sale and delivery to Parham on October 10.

Wirak had no knowledge of the existence of the chattel mortgage until the latter part of September, which was shortly before the delivery of the sheep to Parham. When the division of lambs between Wirak and Ingle took place, Wirak had notice of plaintiff's mortgage; yet he saw fit to consent to a division of the lambs, which divested him of his lien upon them. The division of the lambs did not divest Wirak of the right to have the losses of original stock made good by Ingle, but it did divest him of the security he had for the making good of such loss; so that the mortgage of the bank, which up to that time was subject to the lien of Wirak, was no longer so as between Wirak and the bank.

Another conclusion of law made by the trial court is that, since a delivery of the lambs was made by Wirak and Ingle to Parham, and also by Parham to Bailey—Bailey being a purchaser from Parham—with the knowledge of Wirak and Ingle, before Parham became aware of the bank's mortgage, and the sale between Wirak and Parham being complete, there is no liability on the part of Parham to the bank, although Parham had notice of the mortgage before he paid the money to Wirak. This is not correct, because it overlooks the proposition that the division of the lambs effected a waiver by Wirak of his security upon Ingle's share and operated to vest in Ingle the right to dispose of the proceeds. When, therefore, Ingle directed the payment of his share of the purchase money to the bank, that direction was in effect a verbal assignment which Parham was bound to honor, and upon which the bank could maintain its action.

Moreover, Parham was not an innocent purchaser for value. [3] An innocent purchaser is one who pays, or obligates himself to pay, the full purchase price of property to the vendor, with no notice of any claim or right to the property in another. (4 Words and Phrases, p. 3629; 5 Cyc. 719; 24 Am. & Eng. Ency. Law, 2d ed., p. 12.) Assuming that Wirak made the sale to Parham, and that Ingle was not known in the transaction, as

respondents' attorneys contend in their brief, and that Parham then obligated himself to Wirak for the payment of the full purchase price, he was not an innocent purchaser so far as Ingle was concerned, because he then knew that Wirak was not the sole owner of the lambs, and he also knew that Ingle had some property right in them, and the extent of that right. Knowing, when he first obligated himself to Wirak, that Ingle was a part owner of the lambs, knowing, when the lambs were delivered, that Wirak had no right to receive the entire purchase price, and learning, before he had paid the purchase price, that the bank held a mortgage executed by Ingle, it is difficult to understand how Parham could be an innocent purchaser as to the bank.

Touching the asserted estoppel, these reflections are pertinent: [4] If, as the trial court found, Ingle, at the time of the delivery of the lambs to Parham, was acting as agent of plaintiff in the delivery, plaintiff having previously consented to the sale of the lambs, it necessarily follows that Ingle, as agent for plaintiff, was in possession of the lambs. If the plaintiff was in possession of the lambs just prior to their delivery to Parham, it must have been by reason of the mortgage. Under this theory, it was Ingle who consented to the sale being made by plaintiff who was selling them under the mortgage. Just how this condition of affairs would estop plaintiff from asserting any claim against defendant Parham, in view of the want of any showing that he was misled to his prejudice is by no means clear. (*Yellowstone County v. First Trust & Savings Bank*, 46 Mont. 439, 128 Pac. 596.) It follows that plaintiff was entitled to judgment against defendant Parham.

The judgment and order appealed from are therefore reversed and the cause is remanded, with directions to enter judgment accordingly.

Reversed and remanded.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

STATE, RESPONDENT, v. RAINS, APPELLANT.

(No. 3,802.)

(Submitted March 15, 1917. Decided April 2, 1917.)

[164 Pac. 540.]

*Criminal Law—Murder—Attempt—Information—Insufficiency
—Witnesses—Competency—Husband and Wife.**Attempt to Commit Murder—Insufficient Information.*

1. Information *held* insufficient to support a judgment of conviction under a charge of attempt to commit murder, in that it failed to allege some overt act which in the ordinary and likely course of events would result in the commission of the crime charged, and went no further than to show preparation to commit it.

Same—Witnesses—Competency—Husband and Wife.

2. Under amended section 9483, Revised Codes (Laws 1915, Chap. 111), a wife was competent to testify in a prosecution against her husband for attempted murder.

Appeal from District Court, Ravalli County; R. Lee McCulloch, Judge..

CHARLES RAINS was convicted of attempt to murder and appeals. Reversed and remanded.

Messrs. Johnson & Tucker, for Appellant, submitted a brief; *Mr. Park Smith*, of Counsel, argued the cause orally.

Mr. J. B. Poindexter, Attorney General, and *Mr. W. H. Poorman*, Assistant Attorney General, for Respondent, submitted a brief; *Mr. Frank Woody*, Assistant Attorney General, argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

The principal question presented by these appeals is whether the information, upon which the appellant was tried and convicted of an attempt to commit murder, states facts sufficient to constitute that offense. Omitting the formal parts, the [1] information is as follows:

“In the District Court of the Fourth Judicial District of the State of Montana, in and for the County of Ravalli. * * *

Comes E. C. Kurtz, county attorney of said county, and * * * informs the court: That one Charles Rains, late of the county of Ravalli, state of Montana, on or about the 15th of October, 1915, at and in the county of Ravalli, in the state of Montana, did unlawfully, feloniously, and willfully, on purpose, and with his deliberate premeditated malice aforethought, attempt to kill and murder one Elizabeth Rains, and in said attempt and toward the commission of said offense did, then and there, feloniously and with his premeditated malice aforethought, start to walk to the home of Elizabeth Rains, in the said county of Ravalli, state of Montana, and that upon meeting her, the said Elizabeth Rains, in and upon a private highway a short distance from her home, did then and there, on purpose and with his deliberate premeditated malice aforethought, intercept and stop her, and did strike her in the face, and did compel her to return to her home with him; that upon the arrival at the home of said Elizabeth Rains the said Charles Rains did deliberately and feloniously force her to enter her house, and did enter after her and lock the door, and take possession of the key to said door, all of which was done with the deliberate, premeditated, and felonious intent, then and there, upon the part of him, the said Charles Rains, to kill and murder the said Elizabeth Rains, he, the said Charles Rains, being at said time in the possession of a 38-caliber Iver Johnson revolver, loaded with cartridges containing powder and leaden bullets, and being in possession, at said time, of a 22-caliber special rifle, loaded with cartridges containing powder and leaden bullets, and being at said time in the possession of a bottle containing laudanum, by the use of all of which he, the said Charles Rains, having then and there the deliberate, premeditated, and felonious intent to kill and murder said Elizabeth Rains, did then and there attempt to do so. That said Charles Rains did then and there fail in the perpetration and commission of said offense, and was then and there prevented in the execution of the same, by the following facts: The said Charles Rains did take a water-pail and unlock the door and start to go to a near-by spring for the purpose of

getting a pail of water; that after stepping outside said house he locked the door from the outside, keeping the key to said door in his possession; that as soon as he stepped out of the said door the said Elizabeth Rains opened a window on the opposite side of said house, through which she escaped to a near-by neighbor. All of which is contrary to the form, force, and effect of the statute in such cases made and provided, and against the peace and dignity of the state of Montana."

The appellant's contention is that this document is inadequate to support the judgment, and we think he is correct. Our statute provides: "An act done with intent to commit a crime, and tending but failing to effect its commission, is an attempt to commit that crime." (Rev. Codes, sec. 8894.) And Mr. Wharton, in his excellent work on Criminal Law (eleventh edition, section 212), thus enlarges upon this definition: "An attempt is an intended apparent unfinished crime. It must be intended, since it is of its nature that it should be committed in order to effect a specific criminal result. It must be apparent, since if it be obviously not likely to effect the result at which it aims (*e. g.*, where a popgun is leveled at a ship, or a witch is employed to use enchantments), it is not indictable. It must be unfinished, as otherwise the indictment would be for the complete crime; but there must be at least some appreciable fragment of the crime committed, and it must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter." So, too, the more modern text in 6 R. C. L., page 279, says: "In order to constitute an attempt, it is essential that the defendant, with the intent of committing the particular crime, shall have done some overt act adapted to, approximating, and which in the ordinary likely course of things would result in the commission thereof. Therefore the act must reach far enough toward the accomplishment of the desired result to amount to the commencement of the consummation."

These criteria, which have the support of abundant judicial authority (*People v. Murray*, 14 Cal. 160; *Hicks v. Common-*

wealth, 86 Va. 223, 19 Am. St. Rep. 891, 9 S. E. 1024; *Territory v. Reuss*, 5 Mont. 605, 5 Pac. 885; *People v. Moran*, 123 N. Y. 254, 20 Am. St. Rep. 732, 10 L. R. A. 109, 25 N. E. 412; *Commonwealth v. Tolman*, 149 Mass. 229, 14 Am. St. Rep. 414, 3 L. R. A. 747, 21 N. E. 377, and note; *State v. Hurley*, 79 Vt. 28, 118 Am. St. Rep. 934, and note, 6 L. R. A. (n. s.) 804, 64 Atl. 78; note to *People v. Moran*, 20 Am. St. Rep. 741 *et seq.*), are accepted by the Attorney General, but he insists that overt acts, "appreciable fragments" of the offense designed, are alleged. The information tells us very carefully what the appellant did "in said attempt and toward the commission of said offense," to-wit: He started to walk toward the home of Elizabeth Rains; he met her a short distance from her home, stopped her, struck her in the face, and compelled her to return; he forced her to enter her house and locked her in. All this was very wrong, particularly if done with the intent at some time to kill her, and for it he should be severely punished; but just how the death of Elizabeth Rains could be compassed by any or all of them, unless, after the manner of nations, he purposed to blockade her there until she should starve to death—which is not suggested—we are quite unable to see.

But it is said: "He armed himself with three deadly weapons, to-wit, a loaded revolver, a loaded rifle, and a bottle of laudanum." The information states that he was so armed, but it does not charge that all or any of this panoply of war was actually used in any effort to accomplish the alleged design. The worst that can be said of it is that there was preparation. In *People v. Murray*, *supra*, the court, speaking through Mr. Chief Justice Field, said: "The evidence in this case entirely fails to sustain the charge against the defendant of an attempt to contract an incestuous marriage with his niece. It only discloses declarations of his determination to contract the marriage, his elopement with the niece for that avowed purpose, and his request to one of the witnesses to go for a magistrate to perform the ceremony. It shows very clearly the intention of the defendant, but something more than mere intention is

necessary to constitute the offense charged. Between preparation for the attempt and the attempt itself there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement toward the commission after the preparations are made. To illustrate: A party may purchase and load a gun, with the declared intention to shoot his neighbor; but, until some movement is made to use the weapon upon the person of his intended victim, there is only preparation, and not an attempt. For the preparation he may be held to keep the peace; but he is not chargeable with an attempt to kill. So, in the present case, the declarations and elopement, and request for a magistrate, were preparatory to the marriage; but until the officer was engaged, and the parties stood before him, ready to take the vows appropriate to the contract of marriage, it cannot be said, in strictness, that the attempt was made. The attempt contemplated by the statute must be manifested by acts which would end in the consummation of the particular offense, but for the intervention of circumstances independent of the will of the party." And in *Hicks v. Commonwealth*, 86 Va. 223, 19 Am. St. Rep. 891, 9 S. E. 1024, which was a prosecution for attempt to murder by poison, wherein the defendant procured the poison and ineffectually solicited another to administer it, the supreme court of Virginia remarks: "It has been often held, under statutes similar to our own, that the purchase of a gun with intent to commit murder, or the purchase of poison with the same intent, does not constitute an indictable offense, because the act done in either case is considered as only in the nature of a preliminary preparation, and as not advancing the conduct of the accused beyond the sphere of mere intent." (See, also, *Stabler v. Commonwealth*, 95 Pa. 318, 40 Am. Rep. 653; *Regina v. Williams*, 1 Car. & K. 589; *Cox v. People*, 82 Ill. 191.)

Singularly enough, when all the things alleged in the information had been done and the preparation was complete, the appellant took a water-pail and left the house to get some water,

and while he was gone the victim escaped through a window, "contrary to the form, force, and effect of the statute in such case made and provided, and against the peace and dignity of the state of Montana." Assuming this was sufficient to charge a frustration of the appellant's design within the authorities above cited, what, upon the whole information, was that design? Elizabeth Rains could die but once. Did the appellant intend to shoot her with the revolver, club her to death with the rifle, force the laudanum down her throat, or drown her in the water-pail? And if he intended any of these things, what act did he perform which would have accomplished the design, but for the interruption? The fact is, the details so painfully set forth are unrelated to each other, are mutually exclusive, are unconnected with any accomplishment of the main purpose.

It may be, as urged by the state, that, had these things been omitted, the information would have been sufficient; they, however, were not omitted, but the pleader, by inserting them, limited and characterized his general allegations, so as to make them clearly ineffectual.

Some contention is made that Elizabeth Rains was incompetent to testify over the appellant's objection; but there is nothing in this. (Section 9483, Rev. Codes, as amended by Sess. Laws 1915, Chap. 111, p. 248.)

The judgment and order appealed from are reversed and the cause is remanded, with directions to discharge the appellant, so far as the present information is concerned.

Reversed and remanded.

MR. JUSTICE HOLLOWAY concurs.

MR. CHIEF JUSTICE BRANTLY, being absent, did not hear the argument, and takes no part in the foregoing decision.

PARCHEN, APPELLANT, v. CHESSMAN, RESPONDENT.

(No. 3,737.)

(Submitted March 19, 1917. Decided April 2, 1917.)

[164 Pac. 531.]

*Equity—Reformation of Instruments—“Mutual” Mistake—Renewal of Notes—Evidence.***Appeal and Error—Law of the Case.**

1. Where, on a prior appeal, the facts pleaded by defendant were held sufficient to warrant reformation of the note sued on, such holding became the law of the case, binding, on a subsequent trial or appeal, both upon trial and supreme courts.

Reformation of Instruments—Evidence—Quantum of Proof.

2. The rule that to warrant reformation of an instrument for mistake, the evidence must be clear, convincing and satisfactory, refers to the quality, rather than the quantity, of proof.

[As to causes and proceedings for reformation of instruments, see note in 65 Am. St. Rep. 481.]

Same—Evidence—Quantum of Proof.

3. To warrant reformation of an instrument for mistake, it is not necessary that the mistake be made to appear beyond a reasonable doubt or by any *quantum* of proof beyond a bare preponderance (Rev. Codes, sec. 8028), which preponderance may be established by the testimony of a single witness as against a greater number of witnesses who testify to the contrary (sec. 7861).

Equity—Credibility of Witnesses.

4. In an equity case, the determination of the trial court on the credibility of a witness cannot be interfered with, unless his testimony is characterized by such inherent improbability as in effect to destroy it.

Reformation of Instruments—Bills and Notes—“Renewal.”

5. An agreement for the “renewal” of a note means the substitution of another with the same substantive terms as the old, except as to date of payment and amount.

Same—Mistake of Scrivener—Evidence—Sufficiency.

6. Evidence *held* sufficient to warrant a finding that a mistake had been made, twenty-one years before date of trial, by a scrivener in drafting a renewal note so as to insert a clause waiving the benefits of the statute of limitations not a part of the original note.

Same—“Mutual” Mistake—Evidence.

7. To warrant the reformation of an instrument because of mistake in drafting it, it is not necessary that both parties go upon the witness-stand and admit that the mistake was mutual; where plaintiff asserts that no mistake was made, and defendant deposes to the contrary, the question is one of credibility and weight to be given to their testimony.

Same—Equity—Power to Decree Reformations.

8. Though, in a given case, a technical “mutual” mistake may not be presented to a court of equity, the mistake having been that of a scrivener in formulating the note sought to be reformed, it will nevertheless correct the writing so as to make it express the real agreement of the parties.

Appeal from First Judicial District Court, Lewis and Clark County; John A. Matthews, Judge of the Fourteenth District, presiding.

ACTION by Henry M. Parchen against William A. Chessman. Judgment for defendant and plaintiff appeals. Affirmed.

Messrs. Galen & Mettler, for Appellant, submitted a brief; *Mr. E. W. Mettler* argued the cause orally.

If there is but the unsupported oath of one of the parties to an instrument on one side and the opposing contradictory oath of the other party, together with the words of the instrument on the other side, such unsupported oath is not sufficient to justify reformation, and the evidence should not be submitted to the jury. (*Jackson v. Payne*, 114 Pa. St. 67, 6 Atl. 340.) The uncorroborated testimony of a single witness has also been held insufficient (*In re Sutch*, 201 Pa. St. 305, 50 Atl. 943); especially where the writing is corroborated by defendant's testimony and that of one witness. (*Jackson v. Payne*, 114 Pa. St. 67, 6 Atl. 340.) The failure of a complainant to call as a witness a disinterested person who was present and took part in the original negotiations weighs against his claim when the testimony is conflicting. (*Pope v. Hoopes*, 84 Fed. 927.) "The general rule is that to warrant the reformation of an instrument the evidence must be clear, convincing, and satisfactory." "Some courts go still further and hold that the proof must be beyond a reasonable doubt." (34 Cyc. 984, and notes 33, 34; *United States v. Munroe*, 5 Mason, 572, Fed. Cas. No. 15,835.) "Where the proof is confused, conflicting and contradictory, relief will not be granted." (34 Cyc. 983, and note 42.)

The defendant, in order to prove his case, was required to prove, not only that there was a mistake in the drawing up of the note, but also to prove, by clear, convincing and satisfactory evidence, that it was a mutual mistake. (34 Cyc. 988.) "In all cases it is necessary to make clear the mutuality of the mistake, as reformation is not the remedy for mistakes not partici-

pated in by both parties." (34 Cyc. 919, notes 95, 96.) A party will not be given relief against a mistake induced by his own negligence, as where he has failed to avail himself of means of knowledge of the facts. (16 Cyc. 69, notes 11, 12.)

Messrs. Gunn, Rasch & Hall, for Respondent, submitted a brief; *Mr. M. S. Gunn* argued the cause orally.

To warrant a reformation, in this state a preponderance of the testimony is sufficient. (*Gehlert v. Quinn*, 35 Mont. 451, 119 Am. St. Rep. 864, 90 Pac. 168; *Reid v. Hennessy Merc. Co.*, 45 Mont. 383, 123 Pac. 397.) In other states it is held that in suits to reform instruments the decision should be controlled by a preponderance of the evidence. (*Fitch v. Vatter*, 143 Mich. 568, 107 N. W. 106; *Panhandle Lumber Co. v. Rancour*, 24 Idaho, 603, 135 Pac. 558; *Conaway v. Gore*, 24 Kan. 389.)

The contract made in 1896 referred to the note provided for therein as a "renewal note." The note was to be in renewal of the note of 1894, which did not contain any waiver of the statute of limitations. The contract made in 1897, provided for "a new note," which both parties, according to their testimony, interpreted and understood to mean a renewal note. In the case of *Kedey v. Petty*, 153 Ind. 179, 54 N. E. 798, the court said: "'Renewed' or 'renewal,' as applied to promissory notes, in commercial and legal parlance means something more than the substitution of another obligation for the old one. It means to re-establish a particular contract for another period of time. It means 'to restore to its former conditions an obligation on which the time of payment has been extended' (Eng. Dict. 686); 'imparting continued or new force and effect' (And. Law Dict. 878); 'to make again' (2 Bouv. Law Dict. 876; *Daggett v. Daggett*, 124 Mass. 149, 151)." (See, also, *Lowry Nat. Bank v. Fickett*, 122 Ga. 489, 50 S. E. 396; *Koehler v. Hussey*, 22 Ky. Law Rep. 317, 57 S. W. 241; *Hay v. Star Fire Ins. Co.*, 77 N. Y. 235, 33 Am. Rep. 607.)

In 34 Cyc. 975, in note No. 53, we find the following: "Where mutual mistake was alleged, but the proof showed mistake of one

party and fraud of the other, plaintiff was held to be entitled to relief." (*McCormick Harvesting Mach. Co. v. Woulph*, 11 S. D. 252, 76 N. W. 939; *James v. Cutler*, 54 Wis. 172, 10 N. W. 147; see, also, *Holt v. Holt*, 120 Cal. 67, 52 Pac. 119.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was brought to recover upon a promissory note dated December 26, 1897. The defendant prevailed in the lower court, and plaintiff has appealed.

The second defense interposed is to the effect that in 1893 the defendant executed and delivered to plaintiff his certain promissory note; that when such note became due in 1894 it was renewed by defendant executing and delivering to plaintiff another note; that in 1896 a third note was given in renewal of the second; and that in 1897 the note sued upon was given in renewal of the balance due upon the third note. It is further alleged that the note sued upon was prepared by a scrivener through whose mistake a clause was inserted which neither of the parties to the transaction ever intended should be included; that not any one of the three preceding notes contained the objectionable clause; that it was the intention and agreement of plaintiff and defendant that the note sued upon should be a renewal *pro tanto* of the note executed in 1896; and that it should be in the same form and of like tenor and effect as the preceding notes evidencing the same indebtedness. Upon a former appeal [1] (*Parchen v. Chessman*, 49 Mont. 326, Ann. Cas. 1916A, 681, 142 Pac. 631, 146 Pac. 469) we held that the facts pleaded in this second defense, if true, would warrant reformation of the note and make available the first defense. That decision became the law of the case binding upon this court as well as upon the court below. (*Yellowstone Nat. Bank v. Gagnon*, 25 Mont. 268, 64 Pac. 664; *Conway v. Monidah Trust*, 51 Mont. 113, 149 Pac. 711.)

The findings made by the trial court follow substantially the allegations contained in the defendant's second defense, and the

principal contention now made is that the evidence is insufficient to sustain such findings.

It is insisted that the testimony of the defendant in support of his affirmative defense is altogether uncorroborated, and that, if it is not absolutely necessary that it be corroborated, at least a court of equity should proceed with extreme caution in award-
[2, 3] ing reformation of a written instrument upon the testimony alone of the party seeking such relief. We may agree with counsel that to warrant reformation the evidence must be clear, convincing and satisfactory; but this rule refers to the quality rather than to the quantity of proof. It is idle to refer to authorities which hold that to warrant reformation on the ground of mistake, the mistake must be made to appear beyond a reasonable doubt or by any *quantum* of proof beyond a bare preponderance. Whatever may be the rule in other jurisdictions, the question is set at rest in this state by statute. Section 8028, Revised Codes, declares that in a civil case the affirmative of the issue must be proved, and when the evidence is contradictory, the decision must be made according to the preponderance of the evidence. (*Gehlert v. Quinn*, 35 Mont. 451, 119 Am. St. Rep. 864, 90 Pac. 168.) Neither can it be questioned that the preponderance of the evidence may be established by the testimony of a single witness as against a greater number of witnesses who testify to the contrary; for section 7861, Revised Codes, declares that: "The direct evidence of one witness who is entitled to full credit is sufficient proof of any fact, except perjury and treason." (See *Story v. Maclay*, 6 Mont. 492, 13 Pac. 198; subd. 2, sec. 8028, above.) It was for the trial court
[4] to determine the credibility of the defendant in the first instance, and, unless his testimony is characterized by such inherent improbability as in effect to destroy the testimony itself, this court will not interfere.

We find nothing improbable in the story told by the defendant; on the contrary, there were facts and circumstances corroborating his testimony which doubtless weighed in the estima-
[5] tion of the court below. It is beyond controversy that the

note sued upon is one of a series of four notes given to evidence the same indebtedness. The first one was executed in 1893. In 1894 the second one was given in renewal of the first. In 1896 the third was given in renewal of the second, and finally the note sued upon was given in renewal of the third. As each note was superseded by a new one, the old note was surrendered to the defendant. Upon the trial defendant was unable to produce either the first or third note, but he did produce the second note, which disclosed that it did not contain the objectionable clause found in the one sued upon. If each succeeding note was intended to be a renewal of the preceding one, then every one of the notes should have contained the same substantive terms except as to amount and date of payment. In *Hay v. Star Fire Ins. Co.*, 77 N. Y. 235, 33 Am. Rep. 607, the court said: "An agreement to renew a policy implies that the terms of the existing policy are to be continued, and this would be so of any instrument, in the absence of evidence, that a change was intended."

"The word 'renewed' or 'renewal,' as applied to promissory notes in commercial and legal parlance, means something more than the substitution of another obligation for the old one. It means to re-establish a particular contract for another period of time, to restore to its former condition an obligation on which the time of payment has been extended." (7 Words and Phrases, 6084.)

"The word 'renew,' in a lease providing that the lessee shall have the right to renew the lease, imports a giving of a new lease like the old one, with the same terms, stipulations, and covenants." (4 Words and Phrases, 2d series, 267; *Leavitt v. Maykel*, 203 Mass. 506, 133 Am. St. Rep. 323, 89 N. E. 1056.)

With this second note in evidence tending so strongly to confirm the defendant's version of the transaction, it cannot be said that the trial court was not justified in finding that a mistake was made in drafting the note sued upon; and this is particularly so in view of the fact that twenty-one years elapsed between the execution of the first note and the date of the trial,

and that these witnesses were compelled to rely upon their uncertain recollection of transactions the last of which occurred seventeen years before they testified.

It is further contended that, even though the evidence dis-
[7] closes that as to defendant there was a mistake made in inserting the objectionable clause, there is not any evidence of a mutual mistake, since plaintiff insists that the note correctly represents the agreement made at the time it was executed and delivered. We know of no rule of law which requires that each of these parties must come upon the witness-stand and admit that the writing does not correctly express their agreement, in order to prove that a mistake common to both was made in its execution. The fact that by a mistake a certain provision was incorporated which neither party intended should be included may be proved as any other fact, and if upon the whole case it appears that such a mistake was made, reformation may be authorized, even though one of the parties denies that any mistake whatever occurred. There is presented merely a question of the credibility of the witnesses and the weight to be given to their testimony.

It may be conceded that, if plaintiff and defendant mutually agreed that the note sued upon should be in the same form (excepting amount and date of payment) as the 1894 note, which was produced in evidence, and if the objectionable clause was inserted only through the mistake or inadvertence of the scrivener, there is not presented a *mutual mistake* on the part of plaintiff and defendant according to the strict legal significance of those terms, though such a mistake is frequently referred to as a mutual mistake by the authorities. "The phrase 'a mutual mistake' as used in equity, means a mistake common to all the parties to a written contract or instrument, and it usually relates to a mistake concerning the contents or the legal effect of the contract or instrument." (5 Words and Phrases, 4650; *Page v. Higgins*, 150 Mass. 27, 5 L. R. A. 152, 22 N. E. 63.)

It may be that the only issue presented where it is claimed the mistake occurred through the inadvertence of the scrivener is:

What was the language intended by both parties to be incorporated in the writing? But when the claim is made that by reason of the mutual mistake of the parties the instrument does not express their intention, "the court may inquire what the instrument was intended to mean, and what were intended to be its legal consequences." (Sec. 6110, Rev. Codes.) It is only in a very restricted sense, if at all, that it may be said that this defense presents a question of mutual mistake. It may possibly be said to be a mutual mistake in the same sense that, by defendant executing the note and plaintiff accepting it with the objectionable clause included, both are apparently made to do what neither intended to do, *viz.*, to agree upon a form of note which includes the clause in question. But in reality, if the testimony of defendant be accepted, there was not any mistake made by plaintiff or defendant. They agreed upon the terms of their contract and were not mistaken as to its meaning or as to the legal consequences to flow from it. It was only because of the mistake of the scrivener that the instrument does not correctly express the terms agreed upon.

When it is said by courts and text-writers that equity will [8] not lend its aid to reform an instrument for mistake unless it is a mutual mistake, the terms "mutual mistake" are used in contradistinction to a unilateral mistake or the mistake of one party to the instrument only. If the error occurs through the mistake of the scrivener, it is none the less a mistake, and, to the extent of it, the writing does not express the will of the parties. To that extent the instrument is not their contract, for it lacks the indispensable element of meeting of minds upon the same thing at the same time. To speak of enforcing a contract which never existed is a contradiction of terms.

But, though this case does not present a technical mutual mistake, it does present a mistake which a court of equity will not hesitate to correct to the end that the writing may express the agreement of the parties. (*Born v. Schrenkeisen*, 110 N. Y. 55, 17 N. E. 339; *West v. Suda*, 69 Conn. 60, 36 Atl. 1015; 34 Cyc. 910.)

It is not made certain by this record whether the plaintiff read the note sued upon before it was executed and accepted by him; but we do not deem it material if in fact he read the note before he received it and understood that it contained the objectionable clause. Plaintiff's own testimony makes it clear that he had no agreement with defendant that the note should contain the particular clause in controversy. The question before the trial court was: What were the terms upon which the parties agreed at the time of their agreement? The discovery by one party after that time that the writing does not correctly express the agreement does not affect the agreement itself.

We have examined the other assignments, but do not think they merit special consideration.

The judgment is affirmed.

Affirmed.

MR. JUSTICE SANNER concurs.

MR. CHIEF JUSTICE BRANTLY, being absent, did not hear the argument, and takes no part in the foregoing decision.

CRANE & ORDWAY CO., APPELLANT, v. BAATZ ET AL.,
RESPONDENTS.

(No. 3,743.)

(Submitted March 20, 1917. Decided April 2, 1917.)

[164 Pac. 533.]

Mechanics' Liens—Affidavit—Insufficiency—Construction—Rule.

Mechanics' Liens—Liberal Construction—Rule.

1. The rule that mechanics' lien laws are remedial, and should be liberally construed and applied, means that, the necessary steps having once been taken to secure the lien, the law is subject to the most liberal construction.

Same—Affidavit—Insufficiency.

2. A writing attached to an intended mechanic's lien, which contained no jurat or other evidence to show that the claimant made oath before a person authorized to administer oaths, and which did not assume to

verify either the description of the property affected or the account, did not constitute such an affidavit as is required by section 7291, Revised Codes.

Appeal from District Court, Cascade County; H. H. Ewing, Judge.

ACTION to enforce a materialman's lien by the Crane & Ordway Company, a corporation, against Nick Baatz and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Messrs. Peters & Smith, for Appellant, submitted a brief; *Mr. LaRue Smith* argued the cause orally.

The rule in Montana is that the mechanic's lien law shall be liberally construed. (*Black v. Appolonio*, 1 Mont. 342; *Smith v. Sherman Min. Co.*, 12 Mont. 524, 31 Pac. 72; *Missoula Merc. Co. v. O'Donnell*, 24 Mont. 65, 60 Pac. 594, 991; *McGlaulin v. Wormser*, 28 Mont. 177, 72 Pac. 428; *Western I. Works v. Montana P. & P. Co.*, 30 Mont. 550, 77 Pac. 413.)

The statutes of Montana do not require a jurat in the authentication of an affidavit nor any particular form, further than that the notary shall attach his signature, his seal and statements concerning his residence and the date of the expiration of his commission to whatever form of authentication he adopts. It follows that in this state an oath may be authenticated as well in the body of the affidavit as at the foot of the affidavit, and the courts will look to the recitals in the body of the affidavit to determine whether or not any oath was administered. The recital that the affiant, O'Brien, made his statements under oath is that of the notary, and is to be considered as a part of the notary's certificate. (*Kleber v. Block*, 17 Ind. 294; *Wiley v. Bennett*, 9 Baxt. (68 Tenn.) 581; *Hanson v. Cochran*, 9 Houst. (Del.) 184, 31 Atl. 880; *Bickerdike v. Allen*, 157 Ill. 95, 29 L. R. A. 782, 41 N. E. 740; *Miller v. Caraker*, 9 Ga. App. 255, 71 S. E. 9.) The decisions cited show that any statements not made directly by the affiant as part of the substantive facts to which he is deposing are taken to be the statements of the notary, and if such state-

ments show that the oath was administered, they are as much a certificate of the fact as a formal written statement, or jurat, to that effect placed at the foot of the affidavit by the notary. We submit that the statement, "C. S. O'Brien, being first duly sworn, on oath deposes and says," is the statement of the notary, and is a part of his certificate or authentication of the oath.

The jurat is no part of the affidavit in Montana. (Rev. Codes, sec. 7899.) Where statutes do not require any jurat to be attached to affidavits, or any particular form of evidence of the oath to be affixed to the written declaration, as in Montana, it is the rule that the jurat is no part of the affidavit and not necessarily essential to its validity, but that it is merely a form of evidence that the oath was administered. (*Cox v. Stern*, 170 Ill. 442, 62 Am. St. Rep. 385, 48 N. E. 906; *James v. Logan*, 82 Kan. 285, 136 Am. St. Rep. 105, 108 Pac. 81; *Williams v. Stevenson*, 103 Ind. 243, 2 N. E. 728; *Cohen v. Bernstein*, 170 Ill. App. 113; *Turner v. St. John*, 8 N. D. 245; 78 N. W. 340.) And a demurrer to the affidavit will not reach the jurat. (*Smith v. Walker*, 93 Ga. 252, 18 S. E. 830.)

Furthermore, the courts quite generally agree that where, as here, the statutes do not prescribe any requirements for the formal parts or authentication of an affidavit, evidence *aliunde* may be entertained to show that the oath was in fact administered. (*Turner v. St. John*, 8 N. D. 245, 78 N. W. 340; *Cox v. Stern*, 170 Ill. 442, 62 Am. St. Rep. 385, 48 N. E. 906; *Cohen v. Bernstein*, 170 Ill. App. 113; *Miller v. Caraker*, *supra*; *Williams v. Stevenson*, 103 Ind. 243, 2 N. E. 728; *Cook v. Jenkins*, 30 Iowa, 452; *James v. Logan*, 82 Kan. 285, 136 Am. St. Rep. 105, 108 Pac. 81; *Ladow v. Groom*, 1 Denio (N. Y.), 429; *Pottsville v. Curry*, 32 Pa. St. 443; *Sebesta v. Supreme Court of Honor*, 77 Neb. 249, 109 N. W. 166.) If one party be permitted to introduce evidence impeaching the jurat, certainly the other ought to be permitted to introduce evidence to sustain it or supply it. (*Green v. Rhodes*, 8 Ga. App. 301, 68 S. E. 1090; *Cox v. Stern*, *supra*; *Hitsman v. Garrard*, 16

N. J. L. 124; *Crosier v. Cornell Steamboat Co.*, 27 Hun (N. Y.), 215.)

It would seem unjust to hold that an innocent party should be made to suffer by the notary's error, especially where in fact the oath was administered, and the party against whose property the lien is sought to be enforced is not shown to have been prejudiced. (*Laswell v. Presbyterian Church*, 46 Mo. 279; *Pottsville v. Curry*, 32 Pa. St. 443; *Kruse v. Wilson*, 79 Ill. 233.)

Messrs. Freeman & Thelan, for Respondents, submitted a brief; *Mr. J. W. Freeman* argued the cause orally.

In *Metcalf v. Prescott*, 10 Mont. 283, 25 Pac. 1037, we find a case very similar to the one before us, so far as the sufficiency of the affidavit is concerned, only in that case it was the affidavit to a mining location, and in this case it is an affidavit to a lien notice.

We believe that the same rule as to proof of acknowledgment of the execution of an instrument applies equally to the proof of the taking of an affidavit to a lien, which is filed for record in the county clerk and recorder's office, with other instruments, which have for their purpose the giving of notice to the public, and it is well settled that the acknowledgment of the execution of an instrument cannot be proved in any other manner than by the certificate of the officer taking the acknowledgment. (*Pendleton v. Button*, 3 Conn. 406; *Hayden v. Westcott*, 11 Conn. 129; *Kerr v. Russell*, 69 Ill. 666, 18 Am. Rep. 634; *Solt v. Anderson*, 71 Neb. 826, 99 N. W. 678; *Rogers v. Pell*, 154 N. Y. 518, 49 N. E. 75; *Elwood v. Klock*, 13 Barb. (N. Y.) 50; *Forrester v. Reliable Transfer Co.*, 59 Wash. 86, Ann. Cas. 1912A, 1093, 109 Pac. 312.)

An interesting case on the question of the insufficiency of an affidavit to a lien is found in the case of *Tygart Valley Brewing Co. v. Vilter Mfg. Co.*, 184 Fed. 845, 107 C. C. A. 169. In that case the defense was that the account or lien which was executed and subscribed to before a notary public of the state of Wisconsin was not accompanied by the certificate of

the proper officer. The plaintiff attempted to prove that as a matter of fact the notary public who administered the oath was at the time duly authorized to administer oaths, and that his signature was genuine. The court ruling held that "the want of verification or of a sufficient verification is a defect which goes to the whole claim, and cannot be amended." (Citing Phillips on Mechanics' Liens, 3d ed., sec. 366; Jones on Liens, sec. 1451; *Cream City F. Co. v. Squier*, 2 Misc. Rep. 438, 21 N. Y. Supp. 972; *Colman v. Goodnow*, 36 Minn. 9, 1 Am. St. Rep. 632, 29 N. W. 338; *Hickey v. Collom*, 47 Minn. 565, 50 N. W. 518; *Steton & Post Mill Co. v. McDonald*, 5 Wash. 496, 32 Pac. 108; *Hill v. Alliance Building Co.*, 6 S. D. 160, 55 Am. St. Rep. 819, 60 N. W. 752; *McDonald v. Rosengarten*, 134 Ill. 126, 25 N. E. 429; *McGillivray v. District Tp.*, 96 Iowa, 629, 64 N. W. 974; *Lindsay v. Huth*, 74 Mich. 712, 42 N. W. 358.)

MR. JUSTICE SANNER delivered the opinion of the court.

The correctness of the judgment from which this appeal is taken depends upon whether the plaintiff has a valid lien, under section 7291, Revised Codes, upon the property of the respondent Nick Baatz. As and for such lien the plaintiff filed in the proper office a document comprising: (1) An unsigned notice of lien claim, reciting, among other things, that the claimant furnished certain materials for the Nick Baatz building, erected on lot 1, in block 414, of the original town site of Great Falls, Cascade county, Montana; "that the value of the said materials amounted to the sum of \$2,707.93, as will more fully appear, reference being had to an itemized statement of account of said materials hereunto annexed, marked 'Exhibit A,' and hereof made a part"; (2) the following matter, just after the notice: "[Venue.] Charles S. O'Brien, being first duly sworn, on oath deposes and says: That he is the managing agent for the Crane & Ordway Company, a corporation, the party in the foregoing notice of lien and statement of account of the amount due said Crane & Ordway Company for the materials therein described, after allowing all credits and offsets; that said notice and statement

contains a correct description of the property to be charged with said lien; and that all the facts stated in said notice and statement are true. C. S. O'Brien, Managing Agent for Crane & Ordway Company. On this 3d day of February in the year 1914, before me, Julius C. Peters, personally appeared Charles S. O'Brien, known to me to be the managing agent of the Crane & Ordway Company, the corporation that executed the within instrument, and acknowledged to me that such corporation executed the same. Julius C. Peters, Notary Public for the State of Montana, residing at Great Falls. My commission expires December 19, 1916. [Seal.]” (3) Forty-five typewritten pages of figures headed, “Exhibit A, Itemized Statement of Account,” followed by (4) this matter: “[Venue.] C. S. O'Brien, being first duly sworn, deposes and says that he is the local manager of the Great Falls branch of the Crane & Ordway Company, a corporation existing under and by virtue of the laws of the state of Minnesota; that he has read and examined the within account; that it is true of his own knowledge; that the said account is just; that the balance of twenty-seven hundred seven dollars ninety-three cents (\$2,707.93) is wholly unpaid. C. S. O'Brien. Subscribed and sworn to before me this 3d day of March, 1914. E. H. Schmidt, Notary Public for the State of Montana, residing at Great Falls, Montana. My commission expires July 8, 1916. [Seal.]”

The trial court held this document to be ineffective to create a lien, because it does not purport to be “a just and true account of the amount due * * * after allowing all credits, and containing a correct description of the property to be charged, * * * verified by affidavit,” as required by law; and this conclusion is assailed as a violation of the well-known rule that [1] mechanics' lien laws are remedial, and therefore to be liberally construed and applied. Counsel mistake, and therefore misapply, the rule they seek to invoke. It is that, the necessary steps having once been taken to secure the lien, the law is subject to the most liberal construction, for it is remedial in character, and rests upon broad principles of natural equity and commer-

cial necessity. But the special right acquired in virtue of a mechanic's lien is purely statutory, and the manner of securing it, by perfecting the lien, consists of various steps, which are also statutory, and must be strictly followed. (*Stritzel-Spaberg Lumber Co. v. Edwards*, 50 Mont. 49, 54, 144 Pac. 772; *McGlaulin v. Wormser*, 28 Mont. 177, 181, 72 Pac. 428.) The present case has to do with the means taken to secure the lien. "The [2] paper containing the account, description, and affidavit is deemed the lien," and while certain errors in the account or description may not invalidate the lien, the affidavit is essential, and must go to both the account and the description. (Rev. Codes, sec. 7291.) It will be observed that the only effort to verify the description, as such, occurs in the matter marked (2) above, which contains no jurat, or other intimation by anyone authorized to administer oaths, to show that any oath was taken; on the contrary, it proves, if anything at all, that C. S. O'Brien acknowledged that the corporation claimant executed the notice. By no liberality of construction can the matter embraced in item (2) be called an affidavit. (Rev. Codes, sec. 7988; *Metcalf v. Prescott*, 10 Mont. 283, 294, 25 Pac. 1037.)

The appellant, conceding, as it must, that the affidavit should verify the other two things necessary to make up the lien, to-wit, the account and the description, insists that the affidavit which appears at the end of "Exhibit A, Itemized Statement of Account," that is to say, item (4) above, does so because the "account," to which it refers, means the narration embraced in the entire document, including the description. If this were true, the lien should be sustained, for no set form or order is required (*Wertz v. Lamb*, 43 Mont. 477, 482, 117 Pac. 89); but the true meaning of "account," as used in section 7291, is not as contended, and is not the meaning intended to be conveyed by the affidavit, item (4). This affidavit does not assume to verify the description at all, and does not verify the account itself as the statute requires. The account must be a just and true one, "after allowing all credits," and must be verified as such. The purpose of the affidavit is clear enough. It is not merely to

entitle the lien claim to record, but to furnish a sanction for it in such an oath as will subject the affiant to punishment for perjury if it be false in material particulars. No such result could follow here, even though the description in item (1) were wholly false, or the account in item (3) were altogether untrue and unjust, "after allowing all credits."

The judgment appealed from is affirmed.

Affirmed.

MR. JUSTICE HOLLOWAY concurs.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

LOUD ET AL., APPELLANTS, v. HANSON ET AL., RESPONDENTS.

(No. 3,749.)

(Submitted March 19, 1917. Decided April 10, 1917.)

[164 Pac. 544.]

Chattel Mortgages—Priority—Ownership—Possession—Estoppel—Appeal and Error—Equity—Findings—Conclusiveness.

Appeal and Error—Equity—Findings—Conclusiveness.

1. Unless a finding of the trial court in an equity case is opposed to the clear preponderance of the evidence, it will, on appeal, be accepted as proper.

Chattel Mortgages—Failure of Ownership—Effect.

2. Where a buyer, in anticipation of a sale, gave a note and mortgage to a bank on the chattels which were the subject matter of the transaction, the consideration being credit at the bank to the seller in the amount of the purchase price, and the bank failed to extend such credit, the sale was incomplete, title remained in the seller and the note and mortgage were void, the latter constituting no obstacle to the enforcement of the lien of a subsequent mortgage given by the owner.

Same—Possession—Estoppel.

3. Where, at the time chattels were sought to be mortgaged to a bank, their possession of them in the ostensible mortgagor was no different than it had known it to be for two years prior thereto, to-wit, as manager of the owner, and the bank did not part with value, it was not in position to claim prejudice because of any apparent change of possession.

Same—Partial Validity—Effect.

4. A mortgage invalid as to a portion of the property upon which given because not owned by the ostensible mortgagor, and good as to a grain crop, *held* enforceable as a prior lien upon the crop.

[As to right to enjoin foreclosure sale on ground of alleged error in amount of mortgage indebtedness, see note in *Ann. Cas.* 1912C, 572.]

Appeal from District Court, Yellowstone County; Geo. W. Pierson, Judge.

ACTION by Charles H. Loud and others, copartners in business under the firm name and style of Loud, Collins, Campbell, Wood & Leavitt against Albert S. Hanson and others. Judgment for defendant Farmers & Traders' State Bank, and plaintiffs appeal. Reversed and remanded.

Cause submitted on briefs of Counsel.

Messrs. Loud, Collins, Campbell, Wood & Leavitt, for Appellants.

Messrs. Nichols & Wilson, for Respondents.

MR. JUSTICE SANNER delivered the opinion of the court.

The plaintiffs brought this action to recover upon a certain promissory note for \$800 and interest, executed on August 20, 1914, by the defendant Albert S. Hanson, and to foreclose a mortgage upon certain chattels described in the complaint, given to secure the payment of said note. Maggie Macer, Farmers & Traders' State Bank and American Bank & Trust Company are joined as defendants, under allegations that they claim some interest in the property. The American Bank & Trust Company made no appearance. The Farmers & Traders' State Bank filed a separate answer, claiming in effect that on March 25, 1914, the defendant Macer, then the owner of the chattels in question, mortgaged the same to it to secure the payment of her certain promissory note for \$3,121.70, which mortgage was duly filed for record on April 9, 1914; that said note has not been paid, and, being overdue, a foreclosure of the mortgage as well as a

personal judgment against Macer is demanded. The defendants Hanson and Macer jointly answered, and the effect of their answer is to admit all the allegations of the complaint, and to plead that the defendant Macer was not on March 25, 1915, and never became, the owner of the chattels in question, but that, in order that she might become such owner, said mortgage to the Farmers & Traders' State Bank was signed by her, together with a note to be secured thereby, under terms and conditions assented to by said Hanson and said bank, which conditions were not fulfilled, and in consequence no consideration ever passed to Hanson for the property, or to Macer for the mortgage. The plaintiffs replied to the answer of the bank, denying that Macer was the owner of the property at the time her alleged mortgage to it was signed, and denying that the bank is the owner of any mortgage on the property. Upon these pleadings the case was brought to trial before the court sitting with a jury; later on, by common consent, the jury was discharged, and the cause was submitted to the court for decision upon the evidence presented. The trial resulted in certain findings of fact and conclusions of law by the court, upon which final judgment was entered in favor of the defendant Farmers & Traders' State Bank. It is from this judgment, as well as from an order denying their motion for new trial, that plaintiffs appeal.

The principal question is: Was Macer the owner of the property when the mortgage to the bank was signed? The trial court found that she was, and this we must accept, unless it is opposed to the clear preponderance of the evidence. (*Bordeaux v. Bordeaux*, 32 Mont. 159, 80 Pac. 6; *Dean v. Stewart*, 49 Mont. 506, 143 Pac. 966.)

We think there is no conflict of evidence at all so far as essentials are concerned. As to the crops, the existence of a mortgageable interest in her cannot be doubted; and it is conceded that, if she ever became the owner of the other property, she did so by purchase from Hanson, who, prior to March 25, 1914, was the owner. Concerning such purchase, the undisputed evidence, as given by both Hanson and Ed. Macer (who acted for his wife

in the negotiations), is: That Hanson wanted to sell, and Mrs. Macer wanted to buy; that she was unable to pay the purchase price, and Hanson was unable to give her any time; that it was decided she might have the property if the Farmers & Traders' State Bank would take her note for the purchase price, \$2,700, and credit Hanson with that amount, such note to be secured by mortgage on the property, with such other property as the bank might require; that she executed a note to the bank for \$3,121.70 to cover the purchase price of the Hanson chattels and an old debt due the bank from the Macers, and to secure said note she executed the mortgage on the Hanson chattels, together with the crops to be raised on her land for the year 1914; that because the bank did not credit Hanson with the amount of the purchase price, and paid no money to either Macer or Hanson, the latter declined to consummate the sale; that the parties then agreed Macer might hold, use and enjoy the property for the current year in consideration of the grain crops to be grown on her place and rendered to Hanson as compensation, and this agreement, which has been carried out, forms the basis of Hanson's assertion of ownership in the crops. Mr. Price, the only witness for the bank whose testimony is material to this phase of the case, admits the bank was advised of Hanson's refusal to consummate the sale before the mortgage from Macer was filed; that it was filed in spite of Hanson's objections and insistence to the contrary; that the Macer note for \$3,121.70 was never entered on the bank's account of bills receivable, or elsewhere on its books, because it did not regard the transaction as complete; that no credit was ever given to Hanson, nor any money paid to him or Macer, prior to notice to the bank from Hanson that the deal was off. Price and Hanson agree that the failure to credit Hanson was due to Hanson's refusal to indorse Macer's note; but they conflict as to whether he agreed to do so—Hanson claiming that he agreed to indorse to the extent of the purchase price, to-wit. \$2,700, and Price insisting that Hanson was to indorse for the amount of the note as made.

As we view the matter, it is of no consequence why Hanson [2] declined to indorse. The essential fact is that he and Macer agreed, as they had a right to do, upon a sale which was to be for the equivalent of cash, to-wit, credit to Hanson at the Farmers & Traders' State Bank. Until this consideration passed, the sale was incomplete, and title to the property did not vest in Macer. (Rev. Codes, sec. 4632; *Adlam v. McKnight*, 32 Mont. 349, 80 Pac. 613; 35 Cyc. 274, 275, A; Benjamin on Sales, 7th ed., secs. 343-345; also sec. 4, p. 298 *et seq.*; Mechem on Sales, secs. 477, 541 *et seq.*) But it is insisted Macer had [3] possession of the property when the mortgage was signed. Macer's possession at that time was in no wise different from what it had been for the preceding two years, during which she managed the property for the use and benefit of Hanson. This the bank knew, and so could not have been influenced by any apparent change of possession; nor did it part with any value upon the faith of any change of appearances or declaration by either Hanson or Macer. Indeed, to part with value is the very thing it declined to do, until long after notice that Hanson refused to consummate the sale. Since title to the Hanson chattels never passed to Macer, she was not the owner of them when the mortgage was signed; and since she was not the owner of them when the mortgage was signed, it created no lien upon them, nor any obstacle to the plaintiffs' mortgage from Hanson, so far as this property is concerned.

Emphasis is laid by respondent on the proposition that, until Hanson indorsed or got credit, he had an interest in Macer's note to the extent of the purchase price, and since that interest was seized and sold on execution against him, the bank becoming the ultimate purchaser, neither he nor anyone claiming under him, is in position now to assert any interest in the property. It was not the agreement that Hanson should have, and he never did have, the slightest interest in Macer's note to the bank. Since Macer never had title to the property, the indebtedness for the purchase price never accrued; if the bank chose to think otherwise, and, acting on its judgment, to buy Hanson's supposed

interest on execution sale, that is a loss it must recoup in some way other than at the expense of plaintiffs' mortgage.

Concerning the crops, the case is somewhat different. In them [4] Macer had a mortgageable interest, and upon them her mortgage to the bank was good, as against any contention Hanson might make, though only as security for the old debt. The evidence of Price seems to establish that this debt has been paid; but there is a stipulation in the record, upon which the court doubtless based its finding, to the effect that only \$189.81 has been paid; so that, as the case is presented to us, her mortgage to the bank must be upheld as a prior lien on the crops for the unpaid balance of the old obligation.

As between the plaintiffs and Hanson, the case for foreclosure of plaintiffs' mortgage is complete by admission.

The judgment and order appealed from are therefore reversed, and the cause is remanded, with directions to proceed in conformity with this opinion.

Reversed and remanded.

MR. JUSTICE HOLLOWAY concurs.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

STATE EX REL. MYERSICK, RELATOR, v. DISTRICT COURT
ET AL., RESPONDENTS.

(No. 4,007.)

(Submitted March 27, 1917. Decided April 11, 1917.)

[164 Pac. 546.]

Prohibition—Scope of Writ—Burden of Proof—Remedy at Law.

Prohibition—Scope of Writ

1. When the writ of prohibition issues out of the supreme court, it arrests proceedings of a judicial character only; hence it does not lie as against a sheriff, he being a ministerial officer.

Same—Writ Issues, When.

2. The writ of prohibition issues only in the sound legal discretion of the court—not as a matter of right—and when a plain, speedy and adequate remedy in the ordinary course of law does not exist; it is to be used sparingly in furtherance of justice and to secure order and regularity in inferior tribunals.

[As to when the writ of prohibition lies, see notes in 12 Am. Dec. 604; 18 Am. Dec. 238; 111 Am. St. Rep. 929.]

Same—Burden of Proof.

3. The applicant for a writ of prohibition assumes the burden of showing that the lower court is acting without or in excess of jurisdiction, and that no plain, speedy and adequate remedy in the ordinary course of law exists.

Same—Improper Issuance—Case at Bar.

4. Where the district court ordered an attached stock of liquors, cigars, etc., before judgment in the interest of the parties as provided by Revised Codes, section 6671, the application alleging that the goods were depreciating in quality and value, that the liquor licenses were expiring unused, and that the expense of keeping the property was continuing, an abuse of discretion warranting issuance of the writ of prohibition *held* not apparent.

Same—Remedy at Law.

5. Where a third party claiming attached property sold before judgment had a remedy by action in claim and delivery, or in conversion or by intervention in the original action, prohibition will not lie.

Original application for writ of prohibition on the relation of Charles L. Myersick against the District Court of the Fifteenth Judicial District in and-for Musselshell County and others. Alternative writ quashed and proceeding dismissed.

Messrs. Collins, Campbell & Wood, for Relator, submitted a brief; *Mr. Donald Campbell* argued the cause orally.

Messrs. Boarman & Boarman, for Respondents, submitted a brief; *Mr. J. R. Boarman* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On December 2, 1916, William Moore executed and delivered to Geo. L. Stephens his certain promissory note for \$1,000. Before maturity Stephens indorsed and transferred the note to the First National Bank of Roundup. The bank commenced an action on the note against Moore and Stephens, and caused a writ of attachment to be issued and to be levied upon a stock of

wines, liquors and cigars and certain saloon furnishings and fixtures. This relator made a third party claim to the property attached, but the plaintiff gave to the sheriff a bond of indemnity, and the sheriff retained possession. Upon application of the attaching creditor, the court ordered the sheriff to sell the attached property and deposit the proceeds in court to await judgment. Thereupon relator instituted this proceeding to prohibit the court from taking further steps under the order of sale.

1. The respondent sheriff is not a proper party to this proceeding [1] and must be dismissed. The writ of prohibition, when issued from this court, arrests proceedings of a judicial character only. (*State ex rel. Scharnikow v. Hogan*, 24 Mont. 379, 51 L. R. A. 958, 62 Pac. 493.) The sheriff is a ministerial officer, and his acts are not subject to control by this writ. If it be a fact that the property levied upon belongs to this relator, his remedy for the wrongful seizure must run against the sheriff. The court below was not responsible for the act of the sheriff in levying the writ.

2. Assuming for the purposes of this proceeding that the relator is a person beneficially interested, though not a party to the action in the court below (*Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121; *Cronan v. District Court*, 15 Idaho, 184, 96 Pac. 768), the question presented is: Does the application disclose such a set of circumstances as warrants the relief sought?

The writ of prohibition is an extraordinary judicial writ which [2] issues, not as a matter of right, but only in the sound legal discretion of the court. (*State ex rel. Lane v. District Court*, 51 Mont. 503, L. R. A. 1916E, 1079, 154 Pac. 200.) It is to be used sparingly for the furtherance of justice and to secure order and regularity in the inferior tribunals. It arrests proceedings of a judicial character when such proceedings are without or in excess of jurisdiction (Rev. Codes, sec. 7227), but it issues only when there is not a plain, speedy and adequate remedy in the ordinary course of law (Rev. Codes, sec. 7228; *State ex rel. Browne v. Booher*, 43 Mont. 569, 118 Pac. 271). The applicant

[3] must therefore assume the burden of showing that the court below is acting without or in excess of jurisdiction, and also that he has no plain, speedy and adequate remedy in the ordinary course at law. In this instance we think he has failed in both particulars.

The order of the district court directing the sale of attached [4] property prior to judgment is the only proceeding of a judicial character which is attacked. Jurisdiction to order a sale of attached property prior to judgment is specifically conferred upon the court by section 6671, Revised Codes. To invoke that jurisdiction it must be "made to appear satisfactorily to the court or a judge thereof that the interest of the parties to the action will be subserved by a sale." (*Id.*) The statute does not define the quantity or quality of proof necessary to move the court's discretion or specify the particular facts from which the court is to determine that a sale will best subserve the parties' interests. It is made to appear from the application for the order of sale that portions of the attached goods will depreciate in quality and value, that the licenses are expiring unused, and that the expense of keeping the property is continuing. We think the court might with propriety have required the facts to be set forth with greater particularity; but we are not prepared to say that the application was insufficient to move the court's discretion.

The distinction is to be made between a sale of perishable property held under attachment, and a sale made in the interest of the parties. While it may be to the interest of all concerned that perishable property under attachment be sold *in limine* or before judgment, a sale of such property is made by the sheriff on his own responsibility under the authority conferred by section 6670, Revised Codes. It is only when attached property is sought to be sold under section 6671 that a showing is necessary, and the authority to sell is dependent upon an order of court. In this instance we think the showing and order are sufficient.

3. The relator's petition for the writ of prohibition is further [5] deficient in that he failed to show that he has not a plain,

speedy and adequate remedy in the ordinary course at law. There was available to him an independent action in claim and delivery, or in conversion; but if either of these was inadequate for any reason, he had a complete remedy by intervention in the original action where he might have had determined his right to or interest in the property. (Rev. Codes, sec. 6496; *Dennis v. Kolm*, 131 Cal. 91, 63 Pac. 141; *Potlatch Lumber Co. v. Runkel*, 16 Idaho, 192, 18 Ann. Cas. 591-594, 23 L. R. A. (n. s.) 536, and note, 101 Pac. 396; 2 Corpus Juris, 373; 2 R. C. L. 879; 4 Cyc. 725.)

It goes without saying that, if the defendants in the attachment suit have no interest in the property attached, the purchaser at the sheriff's sale will not secure any title; but this fact does not reflect upon the authority of the court to order a sale of whatever interest, if any, the defendants have.

The motion of the respondent court and judge is sustained. The alternative writ heretofore issued is quashed and the proceeding dismissed.

Dismissed.

MR. JUSTICE SANNER concurs.

MR. CHIEF JUSTICE BRANTLY, being absent, did not hear the argument and takes no part in the foregoing decision.

STATE, RESPONDENT, v. MERK, APPELLANT.

(No. 3,945.)

(Submitted March 10, 1917. Decided April 17, 1917.)

[164 Pac. 655.]

Criminal Law—Homicide—Self-defense—Evidence—Sufficiency.

Homicide—Self-defense.

1. Though society may curtail the right of self-defense and restrain its exercise in many particulars, it is deemed necessary to personal safety and security, and is not incompatible with the public good.

[As to homicide in self-defense, see note in 26 Am. Dec. 279.]

Same—Justification.

2. Under sections 8301 and 8302, Revised Codes, if the party committing a homicide was the assailant or engaged in mortal combat, he must in good faith have endeavored to decline any further struggle before the killing was done, else he cannot invoke self-defense.

Same.

3. A person assailed may act upon appearances as they present themselves to him, meet force with force, and even slay his assailant, though in fact he is not in actual peril, provided circumstances are such that a reasonable man would be justified in acting as he did.

Same—Justification—Duty to Retreat.

4. A person assailed with apparent murderous intent need not retreat and seek a place of safety before slaying his assailant.

Same—Evidence—Sufficiency.

5. Evidence held to show that deceased was the aggressor throughout the difficulty resulting in his death at the hand of accused, so that the latter was justified in shooting deceased.

Appeal from District Court, Madison County; W. A. Clark, Judge.

WILLIAM W. MERK was convicted of manslaughter, and from the judgment and order denying his motion for new trial he appeals. Reversed and remanded.

Messrs. McCaffery & Tyler, for Appellant, submitted a brief and argued the cause orally.

Mr. S. C. Ford, Attorney General, and *Mr. Frank Woody*, Assistant Attorney General, for Respondent, submitted a brief; *Mr. Woody* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the Court.

W. W. Merk was charged with the crime of murder, convicted of manslaughter, and appealed from the judgment and from an order denying his motion for a new trial.

We shall notice but one of the contentions made by the appellant, viz., that the evidence is insufficient to sustain the verdict. There is not any substantial conflict in the evidence. Slight discrepancies as to minor details appear, but these can be accounted for readily without impeaching the integrity of anyone. The defendant is apparently the only living witness

to all the transactions leading up to the tragedy. Each of several other persons was present during a part of the controversy, and it is necessary to piece together these stories to present a composite picture of the whole, independently of the evidence offered by the defendant.

Benjamin Yarbrough, a saloon-keeper at Silver Star, Montana, and a principal witness for the state, testified that about noon of June 2, 1916, James King came into his saloon, and something more than an hour later the defendant and Steve Jovanetti entered the same place; that two or three other persons were present, and all appeared friendly; that card-playing and drinking were indulged in, and after some time Merk and King engaged in conversation with reference to some lambs which King promised to present to Merk's children, and then with reference to some mutton which King claimed he had sent to, or intended for, Merk's family, and which he insisted Merk had received; that Merk denied that he had received the mutton, and King called him a damned liar; that Merk replied in kind, and King remarked that if Merk was not so small, he would slap his face or knock his head off; that Merk then applied to King some vile epithet, and King again remarked that if Merk was not so small, he would hit him; that afterward Jovanetti induced King to go outside, and Merk followed; that when they returned to the saloon King said, "I am all to blame for it," and invited those present to drink with him; that after they had been served, Merk brought up the subject of their previous quarrel, and used some insulting language to King; that King invited Merk to drink and "let it go and say no more about it"; that after taking this drink Merk again referred to their quarrel, and King said to him in effect, "Call me all the vile names you want to and get it off your mind"; that Merk desisted, and the two men then joined the proprietor in drinking; that when Merk again referred to the trouble King remarked that he had done everything to satisfy Merk, and immediately seized Merk by the throat and pushed him against the bar; that Jovanetti attempted to interfere, and King re-

leased Merk and told Jovanetti to stand back or he would give him some of the same treatment; that King again seized Merk by the throat, and they moved to the end of the bar and behind it, breaking some glassware; that he (Yarbrough) interceded, and the men separated and quieted down; that two small boys, Frank Marvin and James Lewis, came to the door, and he then went to a cellar outside the saloon building for some wine, and while he was in the cellar the shooting occurred. Yarbrough had been drinking heavily during the afternoon.

Louis Anderson testified for the state that he was in the saloon for a short time and heard some foul language pass between Merk and King, and that at one time Merk said to King, "Come out and we will settle it," to which King replied, "If you have anything to settle with me, say it right here."

J. H. Barkell was in the saloon for a time early in the afternoon, and heard some of the conversation detailed by Yarbrough.

L. T. Herman heard very little of the conversation, and testified to nothing new.

Frank Marvin, one of the two boys who came to the door of the saloon just before the shooting, testified that when he reached the door of the saloon, King had Merk by the throat, and was asking Merk if he was going to be a man; that King pushed Merk around the end of the bar and behind the bar, breaking the glasses, and on to the cash register; that King slapped Merk's face, released him, and came from behind the bar and said to Merk, "Come on out now and let us be friends," to which Merk replied, "No, I am going to stay here," to which King responded, "Not if I know it," and started around the bar as if to pull Merk out; that Merk then drew a pistol and told King to stand back, and the witness then ran. He heard one shot distinctly, and then several more in such rapid succession that he could not count them.

James Lewis, the other boy, who was thirteen years of age, testified that when he reached the door of the saloon, King was choking Merk and telling Merk to be a man; that he backed

Merk up along the bar and slapped his face. That Jovanetti attempted to interfere, and King said to him, "Are you in this? If you are I will be around there in a minute and give you some of it." That King then threw Merk up against the cash register behind the bar and made Merk apologize and say he would be a man; that King then came from behind the bar and said to Merk, "Come on out here," to which Merk replied, "No, sir; I will stay right here," and then King said, "You won't if I know it," and started around toward Merk; that when King reached the end of the bar Merk drew a pistol and told King to stand back; that he did not know what King was then doing with his right hand; that King stepped back about two steps, and that Merk then fired the first shot and the witness ran, but heard other shots, and heard King fall to the floor and heard groans. The defendant and one of the coroner's jurors testified that at the inquest held on the day following the shooting, this boy, James Lewis, testified that he did not know who fired the first shot.

Otto A. Shultz, King's employer, testified that King usually carried a revolver when he was on the range or about with stock. It was also made to appear that each man emptied all the chambers of his revolver; that Merk probably fired five shots and King six; that three shots from King's revolver entered the back bar and one shot fired by Merk entered the ceiling of the building; that Merk received four slight wounds and King received three wounds, one of which at least was fatal; that King fell to the floor almost immediately after the shooting ceased, and died within a minute or two; that Merk is a small man, while King was six feet three or four inches tall, raw-boned, weighed about 210 pounds, and was about forty-five years old.

Jovanetti and the defendant told substantially the same story as detailed by the witnesses for the state. However, they made it appear that King employed more vile language, was rougher in his treatment of Merk, and that he struck Merk two or three times during the course of the quarrel.

Merk testified that he was choked almost to insensibility; that he was thrown with great force against the cash register; that he refused to come from behind the bar because of his fear of King and to avoid trouble. He denied specifically that he had renewed the war of words at any time, or that he invited King outside to settle their trouble. He testified that he knew that King habitually carried a revolver, and knew that he had one on this day; that he had many opportunities to shoot King while King was choking him, but would not do so and tried to avoid difficulty; that when King started toward him to bring him from behind the bar, King said: "You have got a gun; so have I. Commence shooting"; that both drew their guns at about the same time; that he did not shoot until he deemed himself in imminent peril, and that both fired simultaneously or nearly so. He testified also that he knew that King had been drinking heavily during the afternoon, and introduced several witnesses who testified that King was a violent and dangerous man, particularly while drinking. An equal or greater number testified to his good reputation for peace and good order. The defendant himself had been drinking considerably during the afternoon and before the shooting occurred.

The foregoing fairly epitomizes the material evidence presented in the record. We have omitted the unspeakably foul language which the deceased and defendant employed. Apparently each exhausted his very extensive vocabulary of vituperation and billingsgate.

The right of self-defense has its foundation in the law of [1] nature. It existed before the formation of society, and while every individual is presumed to have surrendered to society the right to punish for crime and for the infractions of individual rights, the possession and exercise of the right of self-defense by the individual are still deemed to be necessary to personal safety and security and not incompatible with the public good. Society may curtail the right somewhat and restrain its exercise in many particulars, but the right itself is brought by the individual with him when he enters society and

is not derived from it. (13 R. C. L. 810.) The right was recognized by the common law though the rules which regulated its exercise were rigid in the extreme—so rigid, indeed, that they have been greatly liberalized by statutes in most of the states. During the territorial *régime* we had statutes designed to secure to every one the right of self-defense, and while these several statutes modified to some extent the rules of the common law, they in turn were superseded by the Codes whose provisions respecting this subject were far more liberal, and doubtless seemed to be more nearly in harmony with the spirit of the age.

A comparison of our present statutory provisions with the provisions of the Compiled Statutes of 1887 (secs. 32–34, Fourth Div.) will disclose the changes effected by the adoption of the [2] Codes. Section 8301, Revised Codes, provides that homicide is justifiable when committed by any person in the lawful defense of himself, when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury and imminent danger of such design being accomplished. Section 8302 provides that a bare fear of the commission of either of the offenses just mentioned is not sufficient to justify homicide, but the circumstances must be sufficient to excite the fears of a reasonable person, and the party killing must have acted under the influence of such fear alone. If the party who commits the homicide was the assailant or engaged in mortal combat, he must really and in good faith have endeavored to decline any further struggle before the homicide was committed.

In *State v. Rolla*, 21 Mont. 582, 55 Pac. 523, this court said: “If it appeared to the accused at the time of the homicide, as a reasonable person, that it was necessary for him to slay his assailant in order to save his own life or prevent receiving great bodily harm, he had a right to act upon such appearances, and slay his assailant, although he was in no actual danger.”

In *State v. Houk*, 34 Mont. 418, 87 Pac. 175, we approved an instruction as follows: “It is not necessary, however, to justify the use of a deadly weapon, that the danger be actual. It is

enough that it be an apparent danger; such an appearance as would induce a reasonable person to believe he was in danger of great bodily harm. Upon such appearance a party may act with safety, nor will he be held accountable though it should afterward appear that the indications upon which he acted were wholly fallacious, and that he was in no actual peril. The rule in such case is this: What would a reasonable person—a person of ordinary caution, judgment, and observation—in the position of the defendant, seeing what he saw, knowing what he knew, suppose from this situation and these surroundings? If such reasonable person so placed would have been justified in believing himself in imminent danger, then the defendant would be justified in believing himself in such peril and acting upon such appearances.” That instruction the court gave in this case. Of course, the defendant might have awaited further assaults by King, and might have taken his chances that they would not result more seriously than the assaults already committed. He might have awaited until he actually received great bodily harm, but if one who is attacked must restrain himself until subsequent events determine whether the attack will result fatally or in grievous bodily harm, then the right of [3] self-defense is one in name only. This is not the law. A person assailed may act upon appearances as they present themselves to him, meet force with force, and even slay his assailant; and, though in fact he was not in any actual peril, yet if the circumstances were such that a reasonable man would be justified in acting as he did, the slayer will be held blameless.

The rule of the common law that, before anyone can be [4] justified in slaying his assailant, he must have retreated to the wall finds no favor with modern courts or text-writers. The defendant was not compelled to seek a place of safety, but in effect he did so. Though it resulted from the brute force of the deceased, the defendant actually found himself behind the bar in a place of comparative safety, and announced his intention to remain there, but was not permitted to do so peaceably. Giving the opprobrious epithets used by the defendant toward

[5] the deceased all the legal effect possible, still the evidence leaves no doubt that the deceased was the aggressor throughout.

This is not a case where the record presents conflicting stories, and where the verdict may be said to rest upon the finding of the jury in favor of the testimony of some witnesses and against the testimony of others. As we have said before, there is not any substantial conflict in the evidence. That with each succeeding assault made by the deceased his violence increased is apparent from the state's evidence, independently of the testimony of the defendant; that by sheer physical force the deceased was able to inflict great bodily injury is equally apparent; and when to this are added the facts that he was armed with a deadly weapon, that he was, to a greater or less extent, under the influence of liquor and by some of his neighbors at least considered to be a dangerous man when in that condition, and that he drew his gun and emptied all the chambers so nearly directly at the defendant that four shots took effect and three of the six fired were found to have lodged in the back bar near where the defendant was standing; and that all the shots were fired so nearly together that the deceased must have drawn his gun before or at the time defendant fired—all lend color to the testimony of the defendant that he shot only when he deemed himself to be in peril, and convince us that it cannot be said beyond a reasonable doubt that a reasonable man in the position of the defendant, seeing what he saw and knowing what he knew, would not have felt justified in doing what he did.

The judgment and order are reversed and the cause is remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

STATE, RESPONDENT, v. BRODOCK, APPELLANT.

(No. 3,999.)

(Submitted April 16, 1917. Decided April 23, 1917.)

[164 Pac. 658.]

Criminal Law — Grand Larceny — Livestock — Hearsay Testimony — Harmless Error — Instructions — Settlement — Objection and Exception — Record — Verdict — When Conclusive.

Grand Larceny — Hearsay Testimony — Harmless Error.

1. Erroneous admission in evidence of hearsay statements that defendant, charged with the theft of cattle, claimed ownership of them, held harmless where he asserted in defense that he owned the animals and undertook to establish such claim by his own testimony as well as by that of others.

Same — Settlement of Instructions — Review — Record on Appeal.

2. Under section 9271, Revised Codes, to entitle appellant in a criminal action to a review of an instruction given, the record must disclose that at the time of settlement of the instructions he made suitable objection and reserved an exception thereto.

Same — Conclusiveness of Verdict.

3. Where the evidence upon an issue in a criminal case is in conflict, the finding of the jury thereon, approved by the district court in denying a new trial, is conclusive, and the claim that the verdict is contrary to the evidence has no merit.

Appeal from District Court, Meagher County; John A. Matthews, Judge.

WILLIAM D. BRODOCK was convicted of larceny, and appeals from the judgment and an order denying him a new trial. Affirmed.

Mr. W. F. O'Leary and Messrs. Carleton & Carleton, for Appellant, submitted a brief; Mr. O'Leary argued the cause orally.

Mr. S. C. Ford, Attorney General, and Mr. Frank Woody, Assistant Attorney General, for the Respondent, submitted a brief; Mr. Woody argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The defendant, convicted of the crime of larceny of certain steers and heifers (grand larceny), has appealed from the judg-

ment of conviction and from an order denying his motion for a new trial. It is contended that the trial court committed prejudicial error in admitting one item of evidence, in submitting a paragraph of its charge to the jury, and in denying the motion for a new trial on the ground that the verdict is contrary to the evidence. The record presents no substantial basis for any of the contentions made.

1. The defendant was charged jointly with one Ducolon, but was awarded a separate trial. The vital issue in the evidence was whether the animals charged to have been stolen belonged to Maggie J. Jenkins, the prosecuting witness, or to the defendant. At the time of his arrest the defendant not being [1] present, Ducolon made statements to the witness Nagues, the sheriff, in answer to questions by him, to the effect that the defendant claimed the ownership of the animals. Nagues was permitted, over defendant's objection, to rehearse these statements to the jury. It is contended that this evidence was incompetent on the ground that it was hearsay, and that defendant was prejudiced by its admission. The ruling was erroneous, because the evidence was clearly hearsay. But its admission was not prejudicial, for the reason that, as already stated, the defense was that defendant was the owner of the animals, and that he undertook to establish this claim by his own testimony and that of his other witnesses. The ruling was thus rendered harmless.

2. Though it be conceded that the instruction criticised by [2] counsel was bad, it cannot, upon the record presented, be made the subject of complaint. Subdivision 4 of section 9271 of the Revised Codes requires the court to settle the instructions about to be submitted, without the presence of the jury, after permitting counsel a reasonable opportunity to examine them—not only those requested, but also those proposed by the court—and to make their objections and reserve their exceptions to the admission or rejection of any requested by counsel or proposed by the court. Counsel must then state the particular ground upon which an instruction is deemed erroneous, and the

judge must pass upon their objections then made, objecting counsel reserving his exception if the ruling is adverse to him. Notes of the proceeding must be taken by the stenographer, embodying all the objections and exceptions to the rulings of the judge in giving or refusing any instruction. At the close of the trial these notes must be extended and filed with the clerk. Thereafter the exceptions reserved may be embodied in a bill of exceptions. If this course is not pursued, the propriety of the giving or refusing of a particular instruction cannot be made a subject of inquiry either upon motion for a new trial or upon appeal. The express provision on the subject, at the close of subdivision 4, is: "No motion for new trial on the ground of errors in the instructions given shall be granted by the district court unless the error so assigned was specifically pointed out and excepted to at the settlement of the instructions, as herein provided; and no cause shall be reversed by the supreme court for any error in instructions which was not specifically pointed out and excepted to at the settlement of the instructions herein specified, and such error and exception incorporated in and settled in the bill of exceptions as herein provided." The record does not disclose the proceedings had at the time of settlement. It therefore does not appear but that counsel for defendant was satisfied with the instruction as given, and that the contention now made is an afterthought.

3. The evidence is in hopeless conflict, both as to the identity [3] and ownership of the animals and upon the question how they came to be in the possession of the defendant. The finding of the jury thereon, approved by the trial court in denying the motion for a new trial, is conclusive upon us. The contention that the verdict is contrary to the evidence must therefore be overruled.

The judgment and order are affirmed.

Affirmed.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

CONTINENTAL OIL CO., APPELLANT, v. JAMESON,
RESPONDENT.

(No. 3,910.)

(Submitted April 16, 1917. Decided April 23, 1917.)

[164 Pac. 727.]

Attachment—Affidavit—Insufficiency.

Attachment—Affidavit—Insufficiency.

1. A paper intended as an affidavit required as a prerequisite to the issuance of a writ of attachment, but not signed by an officer authorized to administer an oath, was insufficient on the face of it.

Same—Motion to Dissolve—Affidavits Inadmissible.

2. Under section 6682, Revised Codes, affidavits tending to show that declarations contained in a purported affidavit were in fact sworn to, but that the notary public inadvertently omitted to sign it, though proper on motion to amend the writing, were inadmissible in opposition to a motion to discharge the attachment.

Same—Security for Debt—Affidavit—Insufficiency.

3. Affidavit on attachment stating that payment of the debt due "is not secured," held insufficient under section 6657, Revised Codes, the statement being referable to the date upon which the writing was prepared, and pregnant with the admission that it had been secured by mortgage or lien prior thereto.

[As to irregularities and defects which will avoid an attachment, see note in 79 Am. Dec. 164.]

Same—Substantial Compliance With Statute Necessary.

4. Substantial compliance with the requirements of the statute is necessary to authorize the issuance of a valid writ of attachment.

Appeal from District Court, Phillips County; Frank N. Utter, Judge.

ACTION by the Continental Oil Company against J. W. Jameson. From an order discharging a writ of attachment, plaintiff appeals. Affirmed.

Mr. W. B. Sands and *Messrs. Nolan & Donovan*, for Appellant, submitted a brief; *Mr. L. P. Donovan* argued the cause orally.

If the failure of the notary to attach his signature and seal to the affidavit, which was sworn to before him, was a defect, the court should have permitted the same to be amended. In the section of the Code which provides for the discharge of the attachment when "improperly or irregularly" issued, it is further provided, "but the court or judge may allow the plaintiff to

amend his affidavit or undertaking.” (Sec. 6683, Rev. Codes.) This is a legislative declaration that a mere defect or irregularity in the affidavit of attachment shall not be deemed fatal to the proceeding; and, since in the case at bar there was no dispute but that the omission of the notary to attach his signature and seal was purely an inadvertence, we respectfully submit that the attachment proceeding should have been upheld, the affidavit being amended if necessary. “The procuring of an attachment is a proceeding within the spirit of the Code, and, if such proceeding is defective, the same may be amended in the furtherance of justice, like any other proceedings, under section 116. (*Pierse v. Miles*, 5 Mont. 550, 6 Pac. 347; *Magee v. Fogerty*, 6 Mont. 237, 11 Pac. 668; *Joseph v. Clothing Co.*, 13 Mont. 195, 33 Pac. 1; *Peiffer v. Wheeler*, 76 Hun, 280, 27 N. Y. Supp. 771; *Thames & Mersey Marine Ins. Co. v. Dimmick*, 66 Hun, 634, 22 N. Y. Supp. 1096; Maxw. Code Pl. 585; *Struthers v. McDowell*, 5 Neb. 491.)” (*Newell v. Whitwell*, 16 Mont. 243, 40 Pac. 866.

Mr. R. E. O’Keefe, for Respondent, argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The Continental Oil Company commenced an action against J. W. Jameson to enforce payment for certain goods, wares and merchandise sold and delivered to the defendant. A writ of attachment was issued and property belonging to the defendant seized. A motion to discharge the attachment, on the ground that an affidavit had not been presented at the time the writ was issued, was granted, and plaintiff appealed from the order.

At the time the writ was issued the plaintiff filed with the [1] clerk of the court the following writing:

“Affidavit of Attachment.

“State of Montana,

County of Blaine—ss.:

“W. B. Sands, being duly sworn, says: That he is the attorney for plaintiff in the above-entitled action. That the defendant

in the said action is indebted to it in the sum of eight hundred sixty-one dollars, lawful money of the United States, over and above all legal setoffs and counterclaims, upon an express contract for the direct payment of money, to wit: A balance due for merchandise sold by plaintiff to defendant of eight hundred sixty-one dollars. That the same is now due, and that the payment of the same is *not secured* by any mortgage, lien, or pledge upon real or personal property. That the attachment is not sought, and the action is not prosecuted to hinder, delay, or defraud any creditor of the defendant.

“W. B. SANDS.

“Subscribed and sworn to before me this 5th day of Nov., A. D. 1915.

“_____,

“Notary Public for Montana Residing at Chinook, Montana.

“My commission expires.”

An indispensable prerequisite to the issuance of a valid writ of attachment is the presentation to the clerk of the court, by the plaintiff, of an affidavit containing the averments enumerated in section 6657, Revised Codes. Section 7988, Revised Codes, defines an affidavit as follows: “An affidavit is a written declaration under oath, made without notice to the adverse party.” On the face of the paper copied above it is not an affidavit, for the declarations contained therein do not purport to be made under oath, or before an officer authorized to administer an oath. It is a mere *ex parte* statement by Mr. Sands. If, as a matter of fact, an oath was administered, and the statements in the writing received the sanction of the oath, but the officer neglected to sign his name to the *jurat*, the writing was subject [2] to amendment under the express provisions of section 6683; but plaintiff did not ask to amend the writing, but contented itself with presenting affidavits in opposition to the motion to discharge, to the effect that the declarations contained in the writing were made under oath, and by inadvertence the officer omitted his signature. In support of an application to amend,

these affidavits would have been proper, but in opposition to the motion they are entirely out of place.

The motion to discharge was made upon the record and not upon affidavits. Section 6682, Revised Codes, provides: "If the motion be made upon affidavits on the part of the defendant, *but not otherwise*, the plaintiff may oppose the same by affidavits or other evidence, in addition to those on which the attachment was made." In the absence of an application to amend, the trial court had before it nothing to disclose the true character of the writing, and its order was commanded by section 6683.

The writing is also defective in substance as well as in form. [3] Section 6657 above requires that the affidavit shall contain the statement that payment of the indebtedness *has not been* secured "by any mortgage or lien upon real or personal property, or any pledge of personal property, or, if originally so secured, that such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless." The purpose of this requirement is obvious. There is but one action for the recovery of debt secured by mortgage upon real or personal property, *viz.*, foreclosure. (Rev. Codes, sec. 6861.) If, however, the debt was originally secured, but without fault of the plaintiff, or the person to whom the security was given, the security has become valueless, an attachment may issue, provided the facts be disclosed in the affidavits.

The statement in this instrument that payment of the debt is *not secured* falls short of the requirements of the statute. It is clearly referable to the date upon which the writing was prepared or tendered to the clerk; and, though the debt may not have been secured at that time, it does not negative the fair implication that it was secured at some time prior thereto. Indeed, the statement is pregnant with the admission that the debt had been secured, and omits altogether any explanation which would [4] warrant an attachment. Substantial compliance with the requirements of the statute is necessary to authorize the issuance

of a valid writ. For this additional reason, the court was justified in making the order.

The order is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

SAVAGE, RESPONDENT, v. BOYCE, APPELLANT.

(No. 3,753.)

(Submitted April 18, 1917. Decided April 28, 1917.)

[164 Pac. 887.]

Personal Injuries—Highways—Law of the Road—Automobile Accident—Negligence—Appeal and Error—Conflict in Evidence—Conclusiveness of Verdict.

Highways—Law of the Road—Automobile Accident—Negligence.

1. Evidence held sufficient to show that defendant, in an action to recover for personal injuries suffered by plaintiffs in colliding with the former's automobile, was at fault in failing to turn to the right of the center of the highway in time, and in omitting to exercise precaution to avoid frightening the animal plaintiff was driving, as provided by sections 1 and 3 of Chapter 72, Laws of 1913, pages 158, 159.

[As to law of the road as to automobile and street-car traveling in same direction, see note in *Ann. Cas.* 1913E, 1121.]

Same—Appeal and Error—When Verdict Conclusive.

2. The evidence being in conflict as to whether plaintiff was asleep when the collision occurred, it was a question for the jury's determination; the conclusion thus reached, and approved by the trial court when it refused to grant a new trial, is conclusive on appeal.

Appeal from District Court, Teton County; J. B. Leslie, Judge.

ACTION by E. R. Savage against B. F. Boyce. Defendant appeals from a judgment for plaintiff, and from an order denying his motion for new trial. Affirmed.

Mr. David J. Ryan, for Appellant, submitted a brief and argued the cause orally.

Without evidence to show that a reasonable person would have anticipated that a collision was imminent—particularly where a mule driven by plaintiff was gentle, tractable and accustomed to automobiles—it cannot be said that anything that defendant did, or failed to do, or caused to be done, was the proximate cause of any injuries to this plaintiff. (1 Thompson on Negligence, secs. 28, 50; *Rysdorp v. George Pankratz Lumber Co.*, 95 Wis. 622, 70 N. W. 677; *Morey v. Lake Superior Terminal & Transfer Co.*, 125 Wis. 148, 12 L. R. A. (n. s.) 221, 103 N. W. 271; *Day v. Kelly*, 50 Mont. 306, 308, 146 Pac. 930.) The evidence discloses that the defendant used the highest degree of care attainable to prevent any injury, inconvenience or annoyance to plaintiff. (*Fletcher v. Dixon*, 107 Md. 420, 68 Atl. 875; *Macomber v. Nichols*, 34 Mich. 212, 22 Am. Rep. 522; *Sapp v. Hunter*, 134 Mo. App. 685, 115 S. W. 463; *Day v. Kelly*, 50 Mont. 306, 308, 146 Pac. 930.) In order for the plaintiff to recover for personal injuries suffered by reason of a breach of duty owed to him by the defendant, it is indispensably necessary that he allege the circumstances disclosing such breach of duty and establish by his evidence that it was the proximate cause of the injury. (*Monson v. La France Copper Co.*, 39 Mont. 50, 133 Am. St. Rep. 549, 101 Pac. 243; *Day v. Kelly*, 50 Mont. 306, 308, 146 Pac. 930.) An inference of negligence may not be drawn from the bare occurrence of an injury in any case. (*Lyon v. Chicago etc. Ry. Co.*, 50 Mont. 532, 148 Pac. 386.)

Mr. D. W. Doyle, for Respondent, submitted a brief and argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought to recover damages for personal injuries suffered by the plaintiff through the negligence of the defendant. The plaintiff resides south of the village of Conrad,

in Teton county. On November 28, 1913, he was returning from Conrad to his home, driving a mule harnessed to a light vehicle. As he proceeded, he observed the defendant, in company with others, about a quarter of a mile away coming from the opposite direction in an automobile. The automobile was owned by defendant and was driven by him. As the two vehicles were about to pass, the automobile came into collision with plaintiff's mule and vehicle, with the result that plaintiff was thrown to the ground and suffered concussion of the brain and contusions about other parts of his body. It is alleged that defendant caused the collision by his negligence in failing to turn the automobile far enough to his right to permit it to pass plaintiff's mule and vehicle in safety. In his answer defendant denied negligence on his part, and, by way of counterclaim, demanded judgment against plaintiff for damage done to his automobile. The jury resolved the issues in favor of the plaintiff and awarded him a verdict. Defendant has appealed from the judgment and an order denying his motion for a new trial.

The only contention made on behalf of defendant is that the [1] evidence was insufficient to justify the verdict. The testimony of the plaintiff showed that the accident occurred under these circumstances: The highway was in a lane sixty feet in width from fence to fence. It was graded up to a crown in the center, the drainage gutter on either side being three or four feet from the fence, and about fourteen inches lower than the crown. The graded portion was about fifty feet in width. The line of principal travel, along which plaintiff was driving, was on the west side, to his right, and as near the fence as one could drive without encountering the bank of the gutter on that side. The part of the way to the east was not so much used, and therefore not so smooth, but was in good condition for travel. The defendant approached plaintiff along the line of principal travel on the west side until he was within twenty or twenty-five feet. He then turned his automobile to the right, but not beyond the center of the way, apparently intending to pass plaintiff without turning out further than was absolutely necessary to enable

him to do so. As he was about to pass, plaintiff's mule became frightened. It first stopped, and then, in an effort to get away, turned to plaintiff's left. As this occurred, defendant's automobile collided with it and also plaintiff's vehicle, throwing plaintiff to the ground and injuring him as alleged. The automobile was turned upside down and came to rest in the middle of the way. Plaintiff had observed the approach of the automobile from the time it was a quarter of a mile away, but did not pay special attention to it, because his mule was accustomed to this kind of vehicle, and he assumed the defendant would take the other side of the way and thus accomplish the passage without trouble. The mule could not turn to the right because of the proximity of the fence on that side. It is apparent from this evidence that the defendant was at fault in failing to turn reasonably to the right of the center of the highway, as is required by the statute. (Laws 1913, Chap. 72, p. 158, sec. 1.) He was on the wrong side of the way. Inasmuch as the collision occurred as it did on plaintiff's side of the way, defendant was also *prima facie* at fault in failing to exercise the precaution necessary to avoid frightening plaintiff's mule, and thus to insure plaintiff's safety. (*Id.*, Chap. 72, p. 159, sec. 3.)

Defendant endeavored to show that plaintiff was at fault in [2] that he was asleep, and, being startled by the approach of defendant and the stopping of his mule, unconsciously guided the mule to his left, and thus caused it to come in collision with the automobile. The evidence on this point was in conflict, and whether the plaintiff was at fault, and thus brought the catastrophe upon himself, presented a question which it was the exclusive province of the jury to determine. The jury having resolved the issues in favor of the plaintiff, and their conclusion having been approved by the court in denying the motion for a new trial, it must be accepted by this court as final.

The judgment and order are therefore affirmed.

Affirmed.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

HUFFINE ET AL., RESPONDENTS, v. LINCOLN, APPELLANT.

(No. 3,751.)

(Submitted April 17, 1917. Decided May 4, 1917.)

[164 Pac. 888.]

*Appeal and Error—Dismissal—New Trial—Newly Discovered Evidence—Compromise Offer—Evidence—Inadmissibility.**Appeal and Error—Filing of Record—Dismissal.*

1. Where the record on appeal from an order denying a new trial had been filed before a motion to dismiss was made, and notice of it given, because not filed with the clerk within sixty days after the appeal had been perfected, the motion will be denied.

New Trial—Newly Discovered Evidence—Compromise Offer.

2. Since, under Revised Codes, section 8040, a compromise offer is inadmissible in evidence against the party making it, a new trial cannot be granted upon the ground of newly discovered evidence consisting of such an offer.

Same—When Denial Proper.

3. Newly discovered evidence relied on for a new trial must be so substantial in character that it would probably produce a different result on another trial; if not of this character, a court may not be held guilty of abuse of discretion in denying a new trial.

[As to newly discovered evidence that will entitle party to new trial, see note in Ann. Cas. 1913E, 147.]

Appeal from District Court, Fergus County; Roy E. Ayers, Judge.

ACTION by Charles M. and Leonie Huffine against A. Lincoln. Judgment for plaintiffs, and defendant appeals from the judgment and an order denying a new trial. Affirmed.

Messrs. Belden & De Kalb and Mr. E. K. Cheadle, for Appellant, submitted a brief; Mr. Cheadle argued the cause orally.

Mr. E. W. Mettler and Mr. J. C. Huntoon, for Respondents, submitted a brief; Mr. Mettler argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

In this action the plaintiffs sought recovery of the defendant on two counts. The first was for a balance of moneys alleged

to have been received by the defendant for the use and benefit of the plaintiffs, in the sum of \$2,329.08, this balance having been ascertained and awarded to plaintiffs by arbitrators to whom they and defendant had theretofore submitted their differences for final adjustment. The second was for the sum of \$408.23 alleged to have been due to plaintiffs for goods, wares and merchandise sold and delivered by them to the defendant, and for the use of teams, wagons, harness, *etc.*, furnished by them to the defendant at his special instance and request. The defendant, answering, denied that he owed any part of the balance demanded in the first count, save and except the sum of \$87.57. He denied all the allegations of the second count. By way of further defenses to both counts, he alleged twelve separate counterclaims. To the fifth, sixth, eighth, ninth, tenth, eleventh and twelfth of these the plaintiffs replied, averring that the amounts demanded therein had all been included in the submission to the arbitrators referred to in the first count of the complaint, and had been adjusted and determined by their award. As an additional defense to the eighth count, they interposed a plea of the statute of limitations. To all the others they interposed specific denials. A trial resulted in a verdict and judgment for plaintiffs for \$2,236.15 and costs. The cause was brought to this court by appeals from the judgment and from an order denying defendant's motion for a new trial.

When the record on appeal was lodged with the clerk, counsel for plaintiffs moved for a dismissal of the appeal from the judgment on the ground that it had not been taken within a year from the date of entry (Rev. Codes, sec. 7099), and of the appeal from the order on the ground that the record had not been filed [1] with the clerk within sixty days after the appeal had been perfected, as prescribed by the rules of this court (Rule IV, subd. 2, 44 Mont. xxvii, 123 Pac. x). The appeal from the judgment was dismissed on the ground stated in the motion, the court reserving decision as to the appeal from the order until final hearing. The motion in this behalf is denied, for the rea-

son that the record had been filed with the clerk before the motion to dismiss was filed and notice of it given. (Rule IV, subd. 3.)

The motion for a new trial was based solely on the ground of newly discovered evidence material to establish defendant's eighth counterclaim, which could not with reasonable diligence have been discovered and produced at the trial. The plaintiffs are husband and wife, the wife being defendant's daughter. Early in the year 1908 they and George Lincoln, a son of defendant, leased from him certain ranches, known as the Lincoln ranches, in Fergus county, with the farming implements, machinery, *etc.*, owned by him thereon. The lease was oral. The terms of it are in some respects not clearly disclosed by the evidence; but it is apparent that the plaintiffs and their colessee, among their other obligations, assumed that of caring for defendant's herd of cattle, and in consideration of their services in this behalf were to have a half interest in the increase of it, in steers suitable for beef. This arrangement was, it seems, to continue for five years. At the end of 1908 George Lincoln ceased to be a party to the lease. Thereafter the lease arrangement was continued between the plaintiffs and defendant up to the latter part of the year 1912. Differences had arisen between them as to their respective rights and liabilities under the lease, and, in order to avoid litigation, on November 17, 1912, they entered into a written agreement to submit all these differences to arbitrators named by them, for final adjustment. It was agreed that the final award should be filed with the clerk of the district court and entry thereof made in the judgment-book by the clerk, under the provision of section 7370 of the Revised Codes. The arbitrators having heard the evidence and made their award, filed it with the clerk on November 23. This action was brought on May 19, 1913. The trial took place in March, 1914, ending on the 9th.

The amount of recovery sought by defendant under the eighth counterclaim was \$3,050, the proceeds of a sale of beef cattle by

plaintiffs and their colessee during the year 1908 for which defendant alleged they had failed to account to him. There was a conflict in the evidence at the trial, both upon the question whether the sum demanded was due from the plaintiffs under the contract of lease, and upon the question whether they had accounted for it in the adjustment by the arbitrators.

The facts recited in the foregoing narrative are sufficient to make clear the purport of the affidavits presented in support of the motion. The affidavit of defendant, after a brief reference to the origin and character of his claim, and a specific averment to the effect that his right to the sum claimed had not been adjusted by the arbitrators, alleges: "On or about the tenth day of March, A. D. 1914, I discovered evidence which will establish the fact that the said moneys so received by the plaintiff Leonie Huffine from the affiant did not belong to her under the terms of the said lease. That on said tenth day of March, A. D. 1914, I discovered a memorandum in writing in the handwriting of the said plaintiff Leonie Huffine, which contains among other things, a clause as follows: 'We * * * agree to pay rents and taxes and return to A. Lincoln \$5,300 which George Lincoln and the Huffines received for the beef which was shipped from the AL herd of cattle in the spring of 1908 or about the time the lease began.' That said evidence is new material to the issue, and not cumulative, nor will it be brought to impeach any evidence or testimony of any witnesses who have heretofore been examined in said action. That I did not know of the existence of said evidence and could not by the use of the utmost diligence have discovered and produced the same upon the former trial." An affidavit by George Lincoln states that he is acquainted with the handwriting of Leonie Huffine, that the memorandum quoted by the defendant was written by her, that he is familiar with the matter stated in defendant's affidavit, and that he believes those statements are true.

The plaintiffs filed counter-affidavits. That of Leonie Huffine recites that when the question of settlement arose between the

plaintiffs and defendant, in order to avoid litigation, they made in writing mutual offers of terms of settlement, exact copies of which are attached; that no other offer was ever made; that in his counter-offer the defendant made no mention of the sum of \$5,300; that the parties could not agree upon a settlement upon the basis of any of the offers, and thereupon agreed to submit their differences to arbitration; that upon the hearing by the arbitrators evidence was given on both sides in relation to all the claims existing between the parties, including the claim for which recovery is sought in defendant's eighth counterclaim; that the arbitrators made their award upon the evidence; and that such award is in full force and effect. It is further alleged that plaintiffs' offer was delivered to the defendant; that at all times after it was made he had full knowledge of its contents; that after it was made, and prior to the submission of their differences to arbitration, this plaintiff and defendant discussed it; and that the affiant never at any time made the offer to the defendant set forth in his affidavit, the only offer made by her being the one a copy of which she tenders with her affidavit. The affidavit of the plaintiff Chas. M. Huffine avers that a second offer was made to defendant, proposing terms of settlement different from those embodied in the one referred to by Leonie Huffine, which contained no reference to the sum of \$5,300 adverted to therein. In all other particulars his affidavit agrees substantially with the affidavit of Leonie Huffine. Both the memoranda referred to are attached as exhibits to his affidavit. The material parts of the memoranda of the two offers are the following:

“No. 1. We turn over 1,075 head of cattle and reserve the right to cut and ship the beef and agree to pay rents and taxes and return to Lincoln one-half of \$5,300, or \$2,650, which Geo. Lincoln and the Huffines received for the beef which was shipped from the AL herd of cattle in the spring of 1908, or about the time the lease began.”

“No. 2. We turn over 1,075 head of cattle, including beef. We pay no rents or taxes; also we are to have all cattle which we may gather in excess of the 1,075 head of cattle, or \$40 per head. We select a man, and Lincoln a man, they to select a third man, to cut and ship the beef. Neither Lincoln nor Huffine to have anything to do with the cutting or shipping of the beef. These men also count the cattle.”

The portions of these memoranda quoted are each followed by an enumeration of articles of personal property which were to be delivered to the defendant, including different kinds of grain, colts and hogs, in case either offer should be accepted as the basis of settlement.

The counter-offer by defendant is the following: “A. Lincoln will settle upon following basis, if settled without litigation, to-wit: (1) Huffine to pay all taxes for 1912. (2) Huffine to pay \$3,000 for use of property present time. (3) Huffine to pay his share on state land purchase. (4) Huffine to return 1,200 head of cattle; also all the stock and calves of thoroughbred cattle. (5) Huffine to return horses received and one-half increase. (6) Huffine to return 13 sows and 39 pigs. (7) Huffine to return enough hay to winter cattle and horses to May 1, 1913. (8) Huffine to return seed and feed grain that he had and used of A. Lincoln. (9) Huffine to repair ditch as agreed, or pay equivalent of it in money. If the Robbins desert is deeded back, waive claim on ditch.”

At the argument in this court, attention having been called to the denials in plaintiffs' affidavits that they had never made the offer quoted in defendant's affidavit, counsel for defendant admitted that the copy of the memorandum attached to plaintiffs' affidavit, as plaintiffs' first offer, is a true copy of the original. Their argument, however, is that, if the memorandum had been brought to the knowledge of the jury at the trial, the result would necessarily have been a finding in favor of the eighth counterclaim, and hence that judgment would have gone for the defendant. This argument proceeds upon the assumption that

the memorandum embodies a distinct admission by plaintiffs that the defendant is entitled to the proceeds of the sale made in 1908, and that upon another trial it will without question establish his right to recover them. If we accept the assumption of counsel as correct, the conclusion must follow, for, though the evidence is cumulative in character, the legal effect of it would be to overcome any denial of their liability by the plaintiffs. But the effect to be given to the writing is to be determined, not by looking alone to the excerpt referred to, but by an analysis of all the memoranda in connection with the circumstances under which they were written. There is an apparent inconsistency in the statements of plaintiffs as to all the circumstances, in that Leonie Huffine states that only one offer was made by plaintiffs and the counter-offer by defendant, whereas Chas. M. Huffine states that plaintiffs made a second offer; nevertheless it stands admitted by the defendant, because he did not file an affidavit contradicting those of plaintiffs, that the memoranda were offers and a counter-offer made in an effort by the parties to adjust their differences and thus avoid a resort to litigation. In legal [2] effect, then, the offer of plaintiffs is not to be construed as an admission that anything was due defendant, but as an offer of a compromise. If, therefore, it had been offered in evidence at the trial, it would not have been admissible. (Rev. Codes, sec. 8040; *Scott v. Wood*, 81 Cal. 398, 22 Pac. 871; 1 Elliott on Evidence, 646; 2 Wigmore on Evidence, 1061.) It would have been held wholly incompetent, and the like ruling would necessarily be made with reference to it on another trial. Hence it cannot be regarded as material within the requirement of the statute authorizing the granting of a new trial on the ground of newly discovered evidence. (Rev. Codes, sec. 6794.) Under [3] the well-settled rule, newly discovered evidence, offered as a ground for a new trial, must not only be material, but so substantial in character that it would probably produce a different result on another trial. (*State v. Matkins*, 45 Mont. 58, 121 Pac. 881, and cases cited.) It is only when the application

makes out a case of this degree of cogency that a trial court should be held guilty of an abuse of discretion in denying it. There must be an end to litigation. The prevailing party is presumptively entitled to the relief awarded him. The presumption thus established in his favor may not be overturned until a cogent reason appears why the discretion vested in the trial court should be exercised in favor of his adversary. Hence, no substantial reason appearing why plaintiffs should be deprived of their advantage, the application was properly denied. The order is affirmed.

Affirmed.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

ELLING ET AL., RESPONDENTS, v. FINE, APPELLANT.

(No. 3,752.)

(Submitted April 17, 1917. Decided May 4, 1917.)

[164 Pac. 891.]

Real Property—Deeds Absolute—Mortgages—Burden of Proof—Laches.

Deeds—Mortgages—Laches.

1. Where, on the face of a deed absolute in form and an accompanying contract agreeing to reconvey, it clearly appears that the transaction was meant to constitute a mortgage, it will be so declared even if the mortgagor was guilty of laches in asserting his claim; for, "once a mortgage, always a mortgage."

[As to absolute deed with agreement to reconvey, see note in 17 Am. Dec. 300.]

Same.

2. Where papers of the character of the above contained no reference to a loan, no mention of any indebtedness and no engagement by the grantor to pay or do anything, the transaction was *prima facie* a sale with an option to repurchase.

Same—Burden of Proof.

3. The burden of showing that the transaction referred to in paragraph 4, *infra*, was intended as a mortgage, was upon the grantor; and if guilty of laches, he could be barred from making the assertion.

Same—Laches.

4. *Held*, that a grantor of mining property under a deed absolute accompanied by an agreement conferring upon him the right to repurchase upon certain conditions, who stood idly by for more than thirteen years while his grantee treated the property as his own, spent money upon it, paid taxes and died, while his executors operated the property, improved it, and paid taxes, and while it passed through probate proceedings and was formally distributed, was barred by laches from asserting the claim that the transaction was intended for a mortgage and not a sale.

Same—Laches—What not Excuse.

5. In the absence of any step by the grantor above to assert his rights—such as to proclaim his position, demand an accounting, or protest against obnoxious expenditures—lack of funds “to go through with anything” he might “start,” *held* not to excuse him for his delay.

Appeal from District Court, Madison County; J. B. Poin-dexter, Judge.

ACTION by Mary E. Elling and others against Benjamin J. Fine. From a judgment for plaintiffs and an order denying new trial, defendant appeals. Affirmed.

Messrs. Walsh, Nolan & Scallon, Mr. S. V. Stewart, and Mr. George R. Allen, for Appellant, submitted a brief and one in reply to that of Respondents; Mr. William Scallon argued the cause orally.

The defense of laches is not available to the plaintiffs under sections 5723 and 6454, Revised Codes, and the following decisions: *Grogan v. Valley Trading Co.*, 30 Mont. 229, 76 Pac. 211; *Hannah v. Vensel*, 19 Idaho, 796, 116 Pac. 115; *McPherson v. Hayward*, 81 Me. 329, 17 Atl. 164; Jones on Mortgages, sec. 330. Even apart from this statute, we submit that the doctrine of laches could not equitably be applied in this action. (*Becker v. McCrea*, 193 N. Y. 423, 23 L. R. A. (n. s.) 754, 86 N. E. 463; *McPherson v. Hayward*, *supra*; *Chase v. Chase*, 20 R. I. 202, 37 Atl. 804; *McKenney v. Page*, 146 Ky. 682, 143 S. W. 382; *Ross v. Leavitt*, 70 N. H. 602, 50 Atl. 110.) Plaintiffs are protected by the contract with respect to their expenditures. Expenditures are expressly provided for. No evidence has been lost on account of the delay.

Messrs. Hartman & Hartman, Mr. M. M. Duncan and Mr. L. O. Evans, for Respondents, submitted a brief; *Mr. Walter S. Hartman* argued the cause orally.

Appellant's rights under his counterclaim must be held to be barred by laches. The only excuse offered by him in his testimony (and he offers none in his pleading) for his protracted delay is his claim of financial inability to act sooner. He does not show in his pleading or testimony that he ever made any attempt to obtain financial assistance to prosecute his claim, and he does not explain in his pleading or testimony why he never sought an accounting or how he knew that it would be necessary to engage in litigation to have his alleged rights recognized. Even so, his financial inability to proceed is no excuse for his failure to promptly assert his rights. (16 Cyc. 169; *Hayward v. National Bank*, 96 U. S. 611, 24 L. Ed. 855; *Leggett v. Standard Oil Co.*, 149 U. S. 287, 37 L. Ed. 737, 13 Sup. Ct. Rep. 902; *Carter v. Mayor of Chattanooga* (Tenn. Ch. App.), 48 S. W. 117; *Bower v. Stein*, 177 Fed. 673, 101 C. C. A. 299.) That the appellant's laches will defeat his right to now assert his claim that the absolute deed and option contract was intended as a mortgage is well settled by all the authorities. (27 Cyc. 1031; *Schradski v. Albright*, 93 Mo. 42, 5 S. W. 807; *Buffum v. Porter*, 70 Mich. 623, 38 N. W. 600; *Turner v. Littlefield*, 46 Ill. App. 169; *Broadbush Heirs v. Potts*, 140 Ky. 583, 131 S. W. 510; *Luesenhop v. Einsfeld*, 93 App. Div. 68, 87 N. Y. Supp. 268; *Learned v. Foster*, 117 Mass. 365; *Ketchum v. Johnson's Exrs.*, 4 N. J. Eq. 370; *Mellish v. Robertson*, 25 Vt. 603; *Harter v. Twohig*, 158 U. S. 448, 39 L. Ed. 1049, 15 Sup. Ct. Rep. 883; *Baird v. Baird*, 48 Colo. 506, 111 Pac. 79; *Fitch v. Miller*, 200 Ill. 170, 65 N. E. 650; *Landrum v. Union Bank*, 63 Mo. 48; *Chapman v. Bank of California*, 97 Cal. 155, 31 Pac. 896; *Goree v. Clements*, 94 Ala. 337, 10 South. 906; *Downing v. Woodstock Iron Co.*, 93 Ala. 262, 9 South. 177; *Fountain v. Lewiston Nat. Bank*, 11 Idaho, 451, 83 Pac. 505; *Elliott v. Bunce*, 10 Cal. App. 741, 103

Pac. 897; *Harris v. Defenbaugh*, 82 Kan. 765, 109 Pac. 681; *Wilson v. Wilson*, 41 Or. 459, 69 Pac. 923; *Speidel v. Henrici*, 120 U. S. 387, 30 L. Ed. 718, 7 Sup. Ct. Rep. 610.) The rule as to the diligence required is particularly rigid when the property involved is of a fluctuating nature as mining property. (*Mantle v. Speculator Mining Co.*, 27 Mont. 473, 478, 71 Pac. 665; *Twin-Lick Oil Co. v. Marburg*, 91 U. S. 587, 23 L. Ed. 329; *Patterson v. Hewitt*, 195 U. S. 309, 49 L. Ed. 214, 25 Sup. Ct. Rep. 35.)

MR. JUSTICE SANNER delivered the opinion of the court.

In this case it is admitted by the pleadings, established by uncontradicted evidence, or found by the court: That the defendant, B. J. Fine (the appellant here), and one J. H. Pankey were, on January 28, 1895, indebted to Henry Elling in the sum of \$93,494.62, all incurred in the purchase, maintenance and operation of certain mining properties situate in Madison county, among them ten unpatented claims and mill sites, referred to as the "Easton group," which are the subject of the present controversy. On that day Fine and Pankey executed, and a few days later delivered to Elling, an instrument, in form a deed absolute, conveying the properties so owned by them to him. At the same time and as part of the same transaction Elling (his wife joining) entered into a written agreement with Fine and Pankey, which agreement recited the execution of said deed and the desire of Fine and Pankey to have "the privilege of repurchasing" the Easton group, and provided that Elling would "resell and reconvey" the same to Fine and Pankey if they should on or before February 1, 1899, pay or cause to be paid to Elling "the sum of \$93,494.62, together with interest thereon * * * at the rate of 10 per cent per annum, and the necessary, proper and legitimate expenses of operating, preserving and maintaining the title and right to the possession of said property, * * * with interest on such amounts at the same rate." Other stipulations of this agreement are these: That

Elling, if he worked the property, must do so "in miner-like fashion and in a manner conducive to the best interests of all the parties to the contract"; that any profits derived from such operations "shall be credited" on the sum fixed as the repurchase price (*viz.*, \$93,494.62); that the costs of improvement and operation "shall be a charge against the property and shall bear interest at the rate of 10 per cent per annum" that Elling "shall keep a just, true and accurate account" of his receipts from and expenditures on behalf of the property; that "either party to this contract may negotiate a sale" of the property, "but no sale can be made by either * * * without the consent of the other party in writing"; that if Elling "shall negotiate a sale * * * he shall receive one-third * * * of the proceeds over and above the sum of \$93,494.62, with interest, * * * costs, and expenditures," but if Fine and Pankey should negotiate a sale, Elling "is to receive nothing" over and above said sum, with interest, costs and expenses; that Elling must maintain and defend the title and possession of said property against all persons and protect it from waste or destruction; and that Fine and Pankey, or either of them, shall have the right "at any time and at all reasonable times to enter upon the premises for the purposes of examination and inspection." Elling went into possession immediately, and from that time remained in the sole and exclusive possession of the property, working and developing it until his death in November, 1900. Thereafter the executors of his will continued to possess, operate and develop the property, until by decree of the district court of Madison county it was formally distributed to the plaintiffs as heirs at law and devisees of Henry Elling, since which time the plaintiffs have possessed, operated and developed the same. During the period elapsing since January 28, 1895, said Henry Elling, his executors, and these plaintiffs have paid all taxes levied against said property, have made large expenditures in mining, developing and improving the same, such expenditures over and above all receipts derived therefrom amounting in 1899

to \$52,627.93, which, with the purchase price, made a total of \$146,122.55, and all this without accounting to anyone. Meanwhile, and on February 21, 1896, there was issued to Henry Elling, and on March 23, 1896, by him recorded, a patent from the United States granting the Easton group in fee simple to him. The value of this property was always speculative and fluctuating in character, never demonstrably greater than \$93,494.62. With full knowledge of all that had been or was being done, Fine and Pankey stood by demanding no accounting, questioning no act, offering no repayment, nor, save some verbal declarations to strangers made by Fine shortly before the plaintiffs brought this suit in February, 1913, had he or Pankey asserted any claim to the property, and Pankey does not now assert any such claim. Fine's contention, as set forth in his counterclaim, is that the transaction whereby Elling became possessed of the property in question was intended as security for the repayment of the indebtedness then due from Fine and Pankey as above mentioned, and that said transaction therefore amounts to a mortgage, from which he ought now to be permitted to redeem by paying such sum as may, after accounting by the plaintiffs, be found to be still due. The trial court, though requested by both sides to find upon this contention, failed to do so specifically, but held that Fine is barred by laches from making this claim or asserting any right to or interest in the property, and also that his "cause of action set up in his counterclaim herein is barred by the provisions of the statute of limitations of this state." As the result plaintiffs were adjudged to be the absolute owners of the property and their title to the same was quieted as against Fine. Hence these appeals.

We may premise at the outset that, if upon the face of the [1] instruments the transaction, made up of the deed and contract, clearly amounts to a mortgage, the judgment is wrong; for, "once a mortgage always a mortgage," plaintiffs had no title, and could get none by the failure of Fine to assert what was obvious on an inspection of the record. But such is not,

[2] upon its face, the effect of the transaction. The deed is absolute and conveys twenty-seven separate lodes and mill sites. The contract bears date two days later than the deed, and Elling's wife joined in its execution. Of the twenty-seven lodes and mill sites it covers and agrees to reconvey only the ten comprised in the so-called Easton group. It contains no reference to a loan, no mention of any indebtedness, no engagement by Fine and Pankey to pay or do anything; although some of its provisions, such as those mentioned above, are remarkable, they are not necessarily inconsistent with its expressed purpose to confer upon Fine and Pankey an option to repurchase property theretofore conveyed by them absolutely to Elling. *Prima facie* the transaction was a sale to Elling with an option to Fine and Pankey to repurchase. (*Gassert v. Bogk*, 7 Mont. 585, 1 L. R. A. [3] 240, 19 Pac. 281.) To reach the conclusion that it was intended as a mortgage, resort to extrinsic evidence was necessary. This means that the burden was upon Fine (*Gassert v. Bogk*, *supra*; *Riley v. Blacker*, 51 Mont. 364, 152 Pac. 758), and that he could be barred by laches from making the contention (*Riley v. Blacker*, *supra*; *Harrington v. Butte & Superior Copper Co.*, 52 Mont. 263, 279, 157 Pac. 181; 27 Cyc. 231).

The trial court held that he was so barred, and we can see no [4] reason for denying this conclusion. The time within which it became the duty of Fine to challenge the apparent effect of the transaction commenced to run on February 1, 1899, when the option contract expired, and he became charged with the knowledge that Elling might thereafter treat the property as unaffected by any claim. From that time until the heirs of Elling commenced this suit more than thirteen years elapsed, during which Fine stood idly by while Elling treated the property as his own, spent money upon it, paid the taxes, and died; while the executors of Elling's will operated the property, spent money for its improvement and paid the taxes upon it; while the property passed through probate proceedings and was by decree formally distributed to Elling's heirs, and while they, as

such heirs, have operated the property and paid the taxes on it ever since. *Riley v. Blacker, supra*, presented a similar situation, concerning which we said: "Laches, considered as a bar independent of the statute of limitations, is a concept of equity; it means negligence in the assertion of a right; it is the practical application of the maxim, 'Equity aids only the vigilant'; and it exists when there has been unexplained delay of such duration or character as to render the enforcement of the asserted right inequitable. Therefore has it often been held by this court that: While a mere delay short of the period of the statute of limitations does not of itself raise the presumption of laches (*Wright v. Brooks*, 47 Mont. 99, 130 Pac. 968; *Parchen v. Chessman*, 49 Mont. 326, Ann. Cas. 1916A, 681, 142 Pac. 631, 146 Pac. 469; *Brundy v. Canby*, 50 Mont. 454, 148 Pac. 315), yet 'good faith and reasonable diligence only can call into activity the powers of a court of equity, and, independently of the period fixed by the statute of limitations, stale demands will not be entertained or relief granted to one who has slept upon his rights. Considerations of public policy and the difficulty of doing justice between the parties are sufficient to warrant a court of equity in refusing to institute an investigation where the lapse of time in the assertion of the claim is such as to show inexcusable neglect on the part of the plaintiff, no matter how apparently just his claim may be; and this is particularly so where the relations of the parties have been materially altered in the meantime.' (*Kavanaugh v. Flavin*, 35 Mont. 133, 88 Pac. 764; *Streicher v. Murray*, 36 Mont. 45, 92 Pac. 36; *Brundy v. Canby, supra*.) What constitutes a material change of condition has been the subject of much judicial discussion and some judicial dissension; but, whatever doubt there may be as to other circumstances, it never has been questioned, to our knowledge, that the death of one of the parties to the transaction is such a change." To the same effect, see 16 Cyc. 163, 164, and cases cited.

The only explanation Fine offers for his delay is lack of funds; [5] he didn't want to start anything'' until satisfied of his ability "to go through with it." However appropriate this stand may be, considered as business strategy, it has no virtue in the field of equity where Fabian tactics are always dangerous. Especially futile must it be to avoid the effect of inaction so prolonged as here, when there were things he could have done—such as to proclaim his position, to demand an accounting, to protest against expenditures he now seems to question—which required no outlay whatever. Under the circumstances here shown, lack of funds is no excuse (16 Cyc. 159, and cases cited; *Leggett v. Standard Oil Co.*, 149 U. S. 287, 37 L. Ed. 737, 13 Sup. Ct. Rep. 902; *Hayward v. National Bank*, 96 U. S. 611, 24 L. Ed. 855; *Carter v. Mayor of Chattanooga* (Tenn. Ch. App.), 48 S. W. 117; *Bower v. Stein*, 177 Fed. 673, 101 C. C. A. 299), and the court was clearly right in applying the doctrine of laches (*Riley v. Blacker*, *supra*; *Maher v. Farwell*, 97 Ill. 56; *Schradski v. Albright*, 93 Mo. 42, 5 S. W. 807; *Turner v. Littlefield*, 46 Ill. App. 169; *Broadbus' Heirs v. Potts*, 140 Ky. 583, 131 S. W. 510; *Elliott v. Bunce*, 10 Cal. App. 741, 103 Pac. 897; *Goree v. Clements*, 94 Ala. 337, 10 South. 906; *Chapman v. Bank of California*, 97 Cal. 155, 31 Pac. 896; *Mellish v. Robertson*, 25 Vt. 603; *Harter v. Twohig*, 158 U. S. 448, 39 L. Ed. 1049, 15 Sup. Ct. Rep. 883; *Baird v. Baird*, 48 Colo. 506, 111 Pac. 79; *Fitch v. Miller*, 200 Ill. 170, 65 N. E. 650; *Landrum v. Union Bank*, 63 Mo. 48).

If, then, Fine was barred by his laches from raising the question of mortgage or no mortgage, the court below was justified in failing to specifically find upon the subject; indeed, such a finding would have been a pure gratuity. We may remark, however, that if, as respondents insist with some reason, a fair inference from the language of the findings made is that the transaction was in fact what it appears to be, *viz.*, a deed absolute with an option to repurchase, we should not be inclined to disturb that conclusion, because we cannot say from a careful

reading of this record that the evidence clearly preponderates against it.

Appellant assails with much force the finding that Fine's cause of action as set forth in his counterclaim "is barred by the provisions of the statute of limitations of this state." This finding is rather vague, since it does not indicate what provisions of the statute of limitations are held to be a bar, and it may be that appellant's criticisms are sound; but if the appellant is barred by laches, and that conclusion is sufficient, as it clearly is, to sustain the judgment, the question of limitations becomes of no importance.

The other matters assigned as error could not command a reversal, and therefore will not be further considered.

The judgment and order appealed from are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

WILCOX, APPELLANT, v. TOSTON STATE BANK ET AL.,
RESPONDENTS.

(No. 3,766.)

(Submitted April 20, 1917. Decided May 10, 1917.)

[165 Pac. 292.]

Justices of the Peace—Service of Summons—Residence of Defendant—Jurisdiction—Waiver.

Justices of the Peace—Service of Summons—Residence of Defendant.

1. *Held*, under section 6986, Revised Codes, that in the absence of a showing that defendant in an action in a justice of the peace court of L. & C. county could not be found and served with summons in B. county, where the action against him accrued and the county of his residence, service of summons in L. & C. county was void, and did not confer jurisdiction upon the justice to try the cause.

[As to effect of irregularity or error in summons issued by justice of the peace, see note in Ann. Cas. 1914A, 1085.]

Same—Want of Jurisdiction—Waiver.

2. Defendant, in an action in a justice of the peace court, did not waive objection to want of jurisdiction over his person, by presenting an answer containing a counterclaim, where he insisted at every stage of the proceedings that the justice did not have jurisdiction.

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

ACTION by Ida J. Wilcox against the Toston State Bank and another. From judgment for defendants, plaintiff appeals. Affirmed.

Messrs. Carleton & Carleton, for Appellant, submitted a brief; *Mr. Frank E. Carleton* argued the cause orally.

Mr. Walter Aitken, for Respondents, submitted a brief and argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was commenced in a justice of the peace court of Lewis and Clark county by filing a copy of an account as follows:

“Shelby, Mont., June 28, 1915.

John C. Clarke and Toston State Bank to Mrs. Ida J. Wilcox,
Dr.

1914.

April 27.	To money deposited with you on my acct....	\$200 00
	To interest	2 65

Total.....\$202 65”

Service of summons was made in Lewis and Clark county upon Clarke personally and as cashier of the bank. The defendants appeared specially and moved for a dismissal upon the ground that the court had no jurisdiction of the person of either defendant. The motion was supported by affidavits to the effect that the defendants are residents of Broadwater county; that the contract upon which plaintiff sues was made and was to be performed in Broadwater county, and that service of summons

was made while defendant Clarke was temporarily in Helena. The motion was denied, and defendants then demurred, but the demurrer was overruled. The bank answered by way of a general denial, and Clarke interposed a separate answer containing denials of all the material allegations of the complaint and a counterclaim for \$71.85. Upon the trial it appeared from the testimony of the plaintiff that her cause of action accrued in Broadwater county, and defendants again moved for a dismissal. The motion was denied and defendants, declining to introduce any evidence, suffered judgment to be taken against them and appealed to the district court. Upon motion of defendants the district court reversed the judgment of the justice of the peace and entered judgment dismissing the action without prejudice, and for defendants' costs. From that judgment plaintiff prosecuted this appeal.

1. Did the justice of the peace court acquire jurisdiction over [1] the person of defendants by virtue of the service of summons upon them in Lewis and Clark county? The place of trial of an action in a justice of the peace court is governed by section 6986, Revised Codes. Each of the first three subdivisions of that section in terms deals with a specific cause of action which accrues in a county other than the county of defendant's residence. Subdivision 4 is vague, but, when considered in the light of former statutes dealing with the same subject, we think it clear that this subdivision was intended to cover all other cases than those enumerated in the first three subdivisions wherein the cause of action accrues in a county other than the county of defendant's residence. It cannot refer to a cause of action which accrues in the county of defendant's residence.

Section 1480 of the Code of Civil Procedure of 1895 (Rev. Codes, sec. 6986) regulated the place of trial of actions in justice of the peace courts from 1895 to 1899. The place of trial of an action which accrued in the township of defendant's residence was in the place of his residence. (Subd. 9.) Section 1480 was amended in 1899. A slight amendment was made to

subdivision 5, and it was renumbered 4. Subdivision 9 was amended and renumbered 7. As under the former statute the only provision governing the place of trial of a cause which accrued in the same township as defendant's residence was the last subdivision of section 1480, so the only statute now governing the place of trial of a cause of action which accrues in the same county as defendant's residence is the last subdivision of section 6986. Such action shall be tried in the county where defendant resides, if he can be found and served with summons therein; but if he cannot be found and served in that county, then the action may be commenced and prosecuted in any county where he may be found and served. In the absence of a showing that these defendants could not be found and served in Broadwater county, the justice of the peace of Lewis and Clark county acquired no jurisdiction of the person of either defendant by virtue of the service of summons.

2. Did defendant Clarke waive objection to the want of jurisdiction over his person by presenting an answer containing a counterclaim? At every stage of the proceedings, defendants insisted upon their objection to the jurisdiction of the justice of the peace of Lewis and Clark county. If that court were one of general jurisdiction wherein formal pleadings are required, there might be merit to the contention that defendant Clarke submitted to the jurisdiction by filing his counterclaim; but a copy of an account serves the purpose of a complaint in a justice of the peace court (sec. 7007, Rev. Codes), and the answer may be oral (sec. 7005, Rev. Codes). If the defendant has a counterclaim not exceeding \$300, it must be set up or it is waived. (Sec. 7010, Rev. Codes.) The complaint in this instance gave no intimation that defendants reside in Broadwater county or that plaintiff's cause of action accrued in that county. It was not until the trial that the latter fact was made to appear, and when it did appear the counterclaim had already been filed.

It was not necessary for defendants to appear specially and challenge the jurisdiction of the inferior court. They were authorized to present whatever defenses they had, and upon trial

for the first time raise the question of want of jurisdiction. Section 7047, subdivision 4, recognizes such right. (*Holbrook, Merrill & Stetson v. Superior Court*, 106 Cal. 589, 592, 39 Pac. 936.) So long as defendant Clarke did not voluntarily submit to the jurisdiction of the inferior court, he did not waive his right to object that it was without jurisdiction over him.

The judgment of the district court is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

HALEY, RESPONDENT, v. HOLLENBACK, APPELLANT.

(No. 3,759.)

(Submitted April 18, 1917. Decided May 15, 1917.)

[156 Pac. 459.]

Contracts—Public Policy—Procuring Testimony—Champerty and Maintenance.

Contracts—Procuring Testimony—Public Policy—Champerty and Maintenance.

1. A contract under which plaintiff agreed to search for legitimate evidence and find witnesses in possession of facts relevant and material to the issues in defendant's personal injury action, compensation to be contingent upon a successful outcome of the litigation, *held* not to contravene public policy.

[As to when a contract is void because for services forbidden by public policy, see note in 66 Am. Dec. 505.]

Same—Validity.

2. Parties are free to contract as they please, so long as the contemplated engagement is not prohibited as illegal or contravenes public policy; and the fact that the obligee may under it do things to the public injury does not itself invalidate it.

Same—Interpretation—Rule.

3. In construing contracts, courts must give them such an interpretation as will make them lawful, if this can be done without violating the intention of the parties.

'Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

ACTION by Andrew J. Haley against Matilda Hollenback. Judgment for plaintiff and defendant appeals from it and from an order denying her a new trial.

Mr. O. W. McConnell and *Messrs. Galen & Mettler*, for Appellant, submitted a brief; *Mr. E. G. Toomey*, of Counsel, argued the cause orally.

This is not a contract between attorney and client, but a contract between a third person, not an attorney at law, who agrees to go out and get witnesses and hunt up testimony in order to get a portion of the recovery, if any recovery is had. Such a contract is champertous, and therefore void. (*Patterson v. Donner*, 48 Cal. 369; *Quirk v. Muller*, 14 Mont. 467, 43 Am. St. Rep. 647, 25 L. R. A. 87, 36 Pac. 1077; *Goodrich v. Tenney*, 144 Ill. 422, 36 Am. St. Rep. 459, 19 L. R. A. 371, 33 N. E. 44; *Lucas v. Allen*, 80 Ky. 681; *Lyon v. Hussey*, 82 Hun, 15, 31 N. Y. Supp. 281; *Neece v. Joseph*, 30 L. R. A. (n. s.) 278, note; *Hughes v. Mullins*, 36 Mont. 267, 271, 13 Ann. Cas. 209, 92 Pac. 758; 6 Cyc. 864; 9 Cyc. 500.) "An agreement provided that if a party would furnish evidence by means of which a judgment could be obtained against a third party, he should have an interest in the judgment. Held, that such a contract partaking of maintenance was void as against public policy." (*Getchell v. Welday*, 4 Ohio Dec. 65.)

Messrs. E. A. & Frank E. Carleton, for Respondent, submitted a brief; the latter arguing the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

In this action plaintiff recovered a verdict for \$500 and costs. Defendant has appealed from the judgment entered thereon and from an order denying her a new trial. The ground of recovery alleged is a breach of contract.

On April 29, 1910, defendant's son, John Hollenback, was electrocuted by coming in contact with a wire heavily charged

with electricity. Hollenback was then in the employ of the Stone & Webster Engineering Corporation, which was engaged in the construction of a dam in the Missouri River, in Lewis and Clark county. Defendant thereafter brought an action against the corporation to recover damages for the death of her son, alleging that it was caused by the culpable negligence of the corporation. This was determined in her favor, the jury awarding her a verdict for \$18,000. After reciting the foregoing facts, the complaint herein alleges:

“III. Plaintiff avers that during the prosecution of said action of *Matilda Hollenback v. Stone & Webster Engineering Corporation* it became and was necessary in order to properly prepare said cause for trial that this defendant, plaintiff in the aforesaid cause of *Hollenback v. Stone & Webster Engineering Corporation*, should employ someone to hunt up the legitimate and proper evidence which would show how the accident occurred, also to show the negligence of the defendant, if such evidence in fact actually existed, as this plaintiff alleges that it did.

“IV. Plaintiff avers that in view of all the foregoing, and on or about the month of —, 1910, he made and entered into a contract with this defendant under and by virtue of which he was to search for *bona fide* witnesses and to hunt up such *bona fide*, competent, and legitimate testimony as he might be able to obtain to be produced upon the trial of the defendant's said case, and to properly advise and to assist in all reasonable and proper ways this defendant generally in the prosecution of said cause, and that, in consideration of the same, defendant promised and agreed with plaintiff that, if she should recover in her said suit, she would pay plaintiff well for such services.

“V. That in pursuance of the aforesaid agreement plaintiff entered upon the due performance of his said contract with this defendant and devoted a large amount of time in finding and endeavoring to find witnesses who were conversant with the aforesaid facts and who would testify as to the true facts regarding the same upon the trial of said cause; that plaintiff

spent considerable sums of money in traveling around and going from place to place in search of evidence. That at one time plaintiff in the due performance of his said duties under said contract made a trip to the city of Butte, in the state of Montana, incurring considerable expense on account of the same.

* * * "

It is then alleged that the plaintiff fully performed the contract on his part; that upon recovery of the judgment in her action defendant became indebted to him for the reasonable value of his services; that she had failed and refused to recognize the contract or to pay plaintiff any sum whatever; and that there is due plaintiff the sum of \$1,500, with interest and costs. Defendant's general demurrer having been overruled, she answered, joining issue upon all the material allegations of the complaint.

Counsel for defendant assail the integrity of the judgment on [1] the grounds that the contract is void because it contravenes public policy, and that the court erred in admitting and excluding evidence. The validity of the contract was questioned by the demurrer, and, during the trial, by motion for nonsuit and for directed verdict. The contention is that, while a suitor may lawfully employ a layman to search for and find witnesses who know the facts relevant and material to the issue which is or will be brought in controversy, for compensation to be paid without regard to the result, if the obligation to pay compensation becomes binding only upon the event of the suitor's success, the contract is illegal and void, in that it has a tendency and opens a strong temptation to procure perjury. They insist that the agent so employed, realizing that he will receive nothing unless the suitor is successful, will naturally produce or secure witnesses whose testimony will win the suitor's case. Hence the contract alleged comes within the class of those denounced by this court in *Quirk v. Muller*, 14 Mont. 467, 43 Am. St. Rep. 647, 25 L. R. A. 87, 36 Pac. 1077, and *Hughes v. Mullins*, 36 Mont. 267, 13 Ann. Cas. 209, 92 Pac. 758.

In the first of these cases the plaintiff had obligated himself to furnish such evidence as would win the suit. In the second the plaintiff had undertaken to furnish evidence which would produce results favorable to the suitor in one or both of two pending suits, *viz.*: (1) Win one or both of them upon trial; or (2) put the plaintiff in such a position that he could force a favorable settlement of one or both of them. All the courts, so far as their decisions have been called to our attention, or we have examined them, hold such contracts void. Mr. Justice De Witt, in *Quirk v. Muller, supra*, quoted with approval the rule as stated by Mr. Bishop, as follows: "The mere tendency of a contract to promote unlawful acts renders it illegal, as against the policy of the law, without regard to any circumstances indicating the probable commission of such acts." (Bishop on Contracts, sec. 476.)

In 6 Cyc., at page 864, it is said: "By the common law, and in most of the states which have adopted the common law or enacted statutes on the subject, an agreement by a third person other than an attorney to defray the expenses of a suit in which he has no interest, or to give substantial support in aid thereof in consideration of a share of the recovery, is champertous." On the same page it is further said: "An agreement to furnish such evidence as shall enable the party to recover a sum of money, or other thing, by action, and to exert influence for procuring evidence to substantiate the claim on condition of receiving a portion of the thing recovered, is champertous."

The contract under consideration in this case, however, does not fall within the class of those considered in *Quirk v. Muller* or *Hughes v. Mullins, supra*, nor within any of the cases cited in support of the text quoted from Cyc. Plaintiff did not agree to furnish evidence that would establish defendant's claim, nor was he to have any portion of the possible recovery. No authority has been called to our attention, nor have we been able to find any, which holds such a contract open to objection because it contravenes public policy. Under the common law in England, a contract by an attorney to conduct an action for

compensation contingent upon recovery is champertous and void. (*Hilton v. Woods*, L. R. 4 Eq. 432; *Earle v. Hopwood*, 7 Jur. N. S. 775.) In some of the states this rule has been recognized and enforced. (*Ware v. Russell*, 70 Ala. 174, 45 Am. Rep. 82; *Lafferty v. Jelley*, 22 Ind. 471; *Roberts v. Yancey*, 94 Ky. 243, 42 Am. St. Rep. 357, 21 S. W. 1047; *Martin v. Clarke*, 8 R. I. 389, 5 Am. Rep. 586.) In some of these cases the contract of the attorney included also a stipulation that he would pay the costs of the litigation. This element, however, does not seem to have been regarded as determinative of the invalidity of the contract. Other authorities hold that such a stipulation is invalid. (*Croco v. Oregon Short Line Ry. Co.*, 18 Utah, 311, 44 L. R. A. 285, 54 Pac. 985.) As the contract in this case does not include such a stipulation, the question whether it would be lawful in this state is not here considered or determined.

By the current of authority a contract for contingent compensation is held valid. (*Smits v. Hogan*, 35 Wash. 290, 77 Pac. 390, and citations in note to this case in 1 Ann. Cas. 299.) In this state, except in so far as they are prohibited by statute, attorneys are free to enter into such contracts with their clients for compensation as they choose. Section 6422 of the Revised Codes declares: "The compensation of an attorney and counselor for his services is governed by agreement, express or implied, which is not restrained by law. * * *

Section 7153 declares: "The measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties. * * *

When we come to look for the restraints imposed by law, we find that, aside from those enumerated in sections 6397 and 6398, among which is not mentioned a contract contingent upon the success of the litigant, we do not find any. The effect of the broad provisions found in sections 6422 and 7153 is that they abolish the common-law doctrine of champerty and maintenance in this state relating to contracts for compensation between attorney and client, except in so far as it is retained in modified form in the other sections cited. The Code of the state of Washington contains

a provision identical with section 7153 (Ballinger's Code, sec. 5165). In *Smits v. Hogan, supra*, the court, after expressing a doubt that the doctrine of champerty ever was in force in Washington, said that, as far as this doctrine relates to the compensation between attorney and client, it must have been repealed by the statute. The same conclusion was reached by the Supreme Court of Utah as to the scope of a similar provision in the Code of that state. (*Croco v. Oregon Short Line Ry. Co., supra.*) If such a contract may be made between an attorney and his client, the inquiry arises: Why should it be held unlawful for the client to contract upon the same basis with a layman for such services as the latter may lawfully perform? An action usually cannot proceed without the aid of an attorney. It cannot proceed at all unless the witnesses are found who can testify in support of plaintiff's suit. It cannot be questioned that it is lawful for a litigant to employ another layman at a stipulated compensation, to be paid in any event, to do for him what he could do for himself, *viz.*: To find the witnesses and to ascertain what the character of their testimony will be. (*Quirk v. Muller, supra.*) The physical condition of the suitor may render this course necessary, as where he has been wholly disabled by a personal injury. Add to this that he is penniless and cannot pay for such needed services unless he succeeds in establishing his claim for damages, and the making of such a contract is necessarily the only means by which he can gain assistance. The attorney employed on a contingency in the same case may not have the time nor the disposition to find the witnesses and thus prepare the case for trial. Unless the suitor may employ a layman upon a contingency, he is effectually barred of his right. Does the contract in the latter case have any greater tendency to promote unlawful acts than it has in the other? The attorney may, and frequently does, include in his employment the service of finding witnesses. Does this fact render his contract illegal? We apprehend that no one would assert this. Though the attorney is an officer of the court, he is not for this reason immune from the temptations to which the average man is sub-

ject. Besides this, his position affords him greater opportunity to make use of "base appliances" than does that of the average layman. Again, take the case of the penniless suitor. If he employs a stranger to find the evidence and promises compensation in any event, he is within the law. Yet the stranger knows very well that he will not receive any compensation unless the suit is won. This contract in final analysis is in no respect different in its tendency than the one based upon a contingency. In our opinion, no cogent reason can be assigned why, if the one is valid, the other is not equally valid, or why, if the attorney's contract is unobjectionable, that of the layman is not also. The latter has no greater tendency to taint the administration of justice than has the former. The obligation assumed in either case is to perform a legitimate service. The fact that the obligee may abuse the contract and make it operate to the public injury [2] does not itself invalidate it. (Greenhood on Public Policy, p. 27.) Parties are entirely free to contract as they please, so long as the particular engagement is not prohibited by law and does not contemplate the doing of any illegal act. That an engagement may be made by its abuse to operate to the public injury is no reason that it should be declared void. The obligation [3] is upon courts always, in interpreting contracts, to give them such an interpretation as will make them lawful, if this can be done without violating the intention of the parties. In any event a contract will be upheld unless it must receive such an interpretation as will compel the conclusion that it contravenes public policy or some express provision of law. (*Lawson v. Cobban*, 38 Mont. 138, 99 Pac. 128; *Dallas v. Douglas*, 45 Mont. 114, 122 Pac. 275; *Finley v. School Dist. No. 1*, 51 Mont. 411, 153 Pac. 1010.) The contention of counsel is overruled.

We have examined the other assignments, but find none of them of sufficient merit to deserve special notice.

The judgment and order are affirmed.

Affirmed.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

STATE EX REL. FORD, RELATOR, v. SCHOFIELD ET AL.,
RESPONDENTS.

(No. 4,005.)

(Submitted March 26, 1917. Decided May 15, 1917.)

[165 Pac. 594.]

Statutes—Local and Special Laws—New Counties—Public Policy—Appeal and Error—Decisions of Other Courts.

New Counties—Statutes—Local and Special Laws—Implied Repeal.

1. *Held*, that Chapter 56, Laws of 1917, creating Carter county, is not invalid as violative of section 26, Article V, of the Constitution, forbidding special legislation where a general law can be made applicable; the Act creating the county being an implied legislative determination that the general law providing for the creation of new counties (Chap. 112, Laws of 1911 and amendments) is no longer applicable under present conditions.

[As to new counties, their relation and that of their officers to old counties, see note in 20 Am. St. Rep. 626.]

Appeal and Error—Decisions of Other Courts—How to be Viewed.

2. Decisions of courts of other states are not binding upon the supreme court of this state; they are useful or persuasive, if the reasoning applied appeals to sound judgment.

New Counties—Public Policy.

3. The creation of new counties is a matter of public policy.

Original proceeding in *quo warranto* by the State on the relation of S. C. Ford, Attorney General, against T. F. Schofield and others. Proceeding dismissed.

Mr. S. C. Ford, Attorney General, *Mr. Frank Woody*, Assistant Attorney General, *Messrs. Walsh, Nolan & Scallon*, and *Mr. Geo. W. Farr*, for Relator, submitted a brief; *Mr. Woody* and *Mr. C. B. Nolan* argued the cause orally.

Messrs. Jones & Jones, *Messrs. Booth & Dousman*, *Messrs. Gunn & Rasch*, *Messrs. Galen & Mettler*, and *Mr. E. G. Toomey*, for Respondents, submitted a brief; *Mr. M. S. Gunn*, *Mr. A. J. Galen*, *Mr. E. S. Booth* and *Mr. Toomey* argued the cause orally.

An investigation of the decisions fails to disclose any judicial opposition to the doctrine that, in the absence of express constitutional restrictions, counties may be created, divided and

even abrogated at the sole will and pleasure of the legislature. They are so peculiarly part and parcel of the state in its civil administration, and an instrument of its sovereignty, that no court has suggested a doubt, in the absence of a plain constitutional inhibition, as to the paramount authority of the legislature in the creation of new counties. (*Markey v. County of Queens*, 154 N. Y. 675, 39 L. R. A. 46, 49 N. E. 71; *White v. Chowan*, 90 N. C. 437, 47 Am. Rep. 534; *Downing v. Mason County*, 87 Ky. 208, 12 Am. St. Rep. 473, 8 S. W. 264; *Kahn v. Sutro*, 114 Cal. 316, 33 L. R. A. 620, 46 Pac. 87; *Covington County v. Kinney*, 45 Ala. 176; 2 Kent Comm. 275; *Ex parte Selma etc. R. Co.*, 45 Ala. 696, 6 Am. Rep. 722; *Henderson v. Board of Supervisors*, 147 N. Y. 1, 30 L. R. A. 74, 41 N. E. 563; *Territory v. Whitney*, 17 Haw. 174, 7 Ann. Cas. 737; *White v. Bond County*, 58 Ill. 297, 11 Am. Rep. 65; *State v. Goldthait*, 172 Ind. 210, 19 Ann. Cas. 737, 87 N. E. 133; *Jones v. Lucas County*, 57 Ohio St. 189, 63 Am. St. Rep. 710, 48 N. E. 882; *Williamsport v. Commonwealth*, 84 Pa. St. 487, 24 Am. Rep. 208; *Bailey v. Lawrence County*, 5 S. D. 393, 49 Am. St. Rep. 881, 59 N. W. 219; *Fry v. County of Albemarle*, 86 Va. 195, 19 Am. St. Rep. 879, and note, 9 S. E. 1004.)

In the particular function of erecting new political subdivisions within the state, is the legislature confined to the enactment of so-called general laws? Those who would impair the plenary power of the legislature to enact either a general or a special law on any subject must point out the specific inhibition. The rule is well settled that the legislative branch of a government has full power to enact special laws unless expressly forbidden by constitutional provisions. (36 Cyc. 989; *Davis v. State*, 68 Ala. 58, 44 Am. Rep. 128; *National Bank v. Augusta Cotton etc. Co.*, 104 Ga. 403, 30 S. E. 888; *Sayles v. Christie*, 187 Ill. 420, 58 N. E. 480; *State v. Des Moines*, 96 Iowa, 521, 59 Am. St. Rep. 381, 31 L. R. A. 186, 65 N. W. 818; Cooley's Const. Limitations, 488.) And the legislature, in the absence of constitutional prohibition, may pass local laws on a subject already covered by general law. (36 Cyc. 989,

note 82; *Dudley v. Birmingham R. etc. Co.*, 139 Ala. 453, 36 South. 700; *Montezuma v. Minor*, 70 Ga. 191; *Miller v. Wicomico County Commrs.*, 107 Md. 438, 69 Atl. 118; *Herbert v. Baltimore County Commrs.*, 97 Md. 639, 55 Atl. 376.)

A law is none the less general because it prescribes conditions or imposes qualifications which cannot be met by all the people within the jurisdiction who may desire the creation of a new county. (See *State v. Spaude*, 37 Minn. 323, 34 N. W. 164; *Iowa R. R. Land Co. v. Soper*, 39 Iowa, 112; *Phillips v. Missouri Pacific Ry. Co.*, 86 Mo. 540; *Wheeler v. Philadelphia*, 77 Pa. St. 338; *Abeel v. Clark*, 84 Cal. 226, 24 Pac. 383; *State v. Parsons*, 40 N. J. L. 123, 29 Am. Rep. 210; *State Board of Assessors v. Central R. R. Co.*, 48 N. J. L. 146, 4 Atl. 578; *State v. Ellet*, 47 Ohio St. 90, note in 21 Am. St. Rep. 772, 23 N. E. 931; *State ex rel. Bray v. Long*, 21 Mont. 26, 52 Pac. 645.)

Judicial exposition of identical constitutional provisions establishes that save for the specific enumerations, the legislature is the sole judge of the cases where general laws can be made applicable, and that its enactment of a special law is a conclusive determination of the inapplicability of any existing general law. The Constitution leaves a discretion with the legislature to determine the case in which a special law is necessary. (*Little Rock v. Parish*, 36 Ark. 166, 172; *Brown v. Denver*, 7 Colo. 305, 3 Pac. 455; *Pennsylvania Co. v. State*, 142 Ind. 328, 41 N. E. 937; *State v. Sanders*, 42 Kan. 228, 21 Pac. 1073; *People v. Bowen*, 21 N. Y. 517; *Mosier v. Hilton*, 15 Barb. (N. Y.) 657; *Terre Haute etc. R. R. Co. v. Cox*, 102 Fed. 825, 42 C. C. A. 654; *Guthrie Nat. Bank v. Guthrie*, 173 U. S. 528, 43 L. Ed. 796, 19 Sup. Ct. Rep. 513.) The weight of authority does not stop here, but holds that the legislature is the sole and exclusive judge in determining when a general law will not subserve the purpose as well as a special Act, and that the conclusion of the legislature that a special Act should be enacted is final and conclusive, and not subject to judicial review. (*Carson v. St. Francis Levee Dist.*, 59 Ark. 513, 27

S. W. 590; *Wilson v. Board of Trustees*, 133 Ill. 443, 27 N. E. 203; *Mode v. Beasley*, 143 Ind. 306, 42 N. E. 727; *Chesney v. McClintock*, 61 Kan. 94, 58 Pac. 993; *Edmonds v. Herbrandson*, 2 N. D. 270, 14 L. R. A. 725, 50 N. W. 970; *McGill v. State*, 34 Ohio St. 228, 247; *Addington v. Canfield*, 11 Okl. 204, 66 Pac. 355; *Smith v. Grayson County*, 18 Tex. Civ. App. 153, 44 S. W. 921; *Travelers' Ins. Co. v. Township of Oswego*, 59 Fed. 58, 7 C. C. A. 669, reversing 55 Fed. 361; *Board of Commrs. v. Vandriss*, 115 Fed. 866, 53 C. C. A. 192.)

Nor does the existence of a general law covering the subject at the time of the passage of the special law, whose existence is being questioned, affect the question. The fact that a preceding legislature may have considered that a general law on the subject could be made applicable is not binding upon a succeeding legislature. (*Indianapolis v. Navin*, 151 Ind. 139, 41 L. R. A. 334, 337, 47 N. E. 525, 51 N. E. 80; *Dallas v. Western Electric Co.*, 83 Tex. 243, 18 S. W. 552; *Smith v. Grayson County*, 18 Tex. Civ. App. 153, 44 S. W. 921; *Dudley v. Birmingham R. etc. Co.*, 139 Ala. 453, 36 South. 700; *Montezuma v. Minor*, 70 Ga. 191; *Miller v. Wicomico County Commrs.*, 107 Md. 438, 69 Atl. 118; *State v. Wilcox*, 45 Mo. 458.)

Quilici v. Strosnider, 34 Nev. 9, 115 Pac. 177, upholds the enactment of a special law, changing a county seat, notwithstanding the existence of a general law on the subject. The opinion is by a court which assumes to determine the applicability of a general or special Act in each instance as a question of fact. While the court, nominally, contends for and appropriates unto itself this power, it is interesting to note its refusal to interfere with the legislative determination. (See, also, *Van Hook v. McNeil Monument Co.*, 107 Ark. 292, 155 S. W. 110; *Leonard v. American Life etc. Co.*, 139 Ga. 274, 77 S. E. 41; *People v. Dunn*, 255 Ill. 289, 99 N. E. 577; *Cleveland etc. R. Co. v. Blind*, 182 Ind. 398, 105 N. E. 483; *Jones v. McClaughry*, 169 Iowa, 281, 151 N. W. 210; *Woodall v. Darst*, 71 W. Va. 350, Ann. Cas. 1914B, 1278, 44 L. R. A. (n. s.) 83, 77 S. E. 264, 80 S. E. 367.)

As expressed in *St. Louis Southwestern Ry. Co. v. State*, 97 Ark. 473, 134 S. W. 970, 973, "the question is solely whether or not a general law can be made applicable"; but this question has already been repeatedly answered in the negative by the decisions of this court, in considering similar legislation. (*Holliday v. Sweet Grass Co.*, 19 Mont. 364, 48 Pac. 553; *State ex rel. Williams v. Mayhew*, 21 Mont. 93, 52 Pac. 981; *State ex rel. Sackett v. Thomas*, 25 Mont. 226, 64 Pac. 503.) Does it not follow that if a general law could not be made applicable to the creation of a county at the time of these decisions, such general law equally cannot be made applicable at this time? Every consideration requires that the doctrine of *stare decisis* be applied to this case, and that the former uniform decisions in this court upon the point in question should be reaffirmed. (11 Cyc. 745, note 76; *Boggs v. Dunn*, 160 Cal. 283, 116 Pac. 743.) And the foregoing for the reason that the Act of one legislature is not binding upon a future legislative assembly, and this is especially true where a question of fact is involved. (*Bloomer v. Stolley*, Fed. Cas. No. 1559, 5 McLean, 158; *Files v. Fuller*, 44 Ark. 273; *Gilleland v. Schuyler*, 9 Kan. 569; *Armstrong v. Dearborn County Commrs.*, 4 Blackf. (Ind.) 208; *Gonzales v. Sullivan*, 16 Fla. 791; *Mix v. Illinois Central Ry. Co.*, 116 Ill. 502, 6 N. E. 42; *Debolt v. Ohio Life Ins. etc. Co.*, 1 Ohio St. 563; *Brightman v. Kirner*, 22 Wis. 53; Cooley's Constitutional Limitations, 7th ed., 174-176.)

The foregoing propositions have sustained the creation of a county by special Act, notwithstanding the existence of a general law on the subject, under identical constitutional provisions; this by a court which insists that the question of the applicability of a general law is a judicial one. (See *People v. McFadden*, 81 Cal. 489, 15 Am. St. Rep. 66, 22 Pac. 851, affirmed in *People v. County of Glenn*, 100 Cal. 419, 38 Am. St. Rep. 305, 35 Pac. 302, reaffirmed in *Wheeler v. Herbert*, 152 Cal. 224, 92 Pac. 353.)

• In the Constitution of Wisconsin there is a prohibition against local and special legislation locating or changing county seats.

(Sec. 31, Art. IV.) Notwithstanding this prohibition, the right to create a county by special Act is and has been recognized in that state for fifty years. (*State v. Stevens*, 112 Wis. 170, 88 N. W. 48.)

There is no question of delegated authority presented. (*People v. McFadden*, *supra*.) It is apparent, then, that if the legislature has not delegated its legislative power, it still retains it, and can create counties just as it did before the passage of the Act of the fourteenth legislative assembly. The cases are collected in Ann. Cas. 1914C, at page 626, in a note to *People v. Kennedy*, 207 N. Y. 533, 101 N. E. 442. Even if a question of delegated authority were presented, it is well settled that "whatever powers the legislature may delegate to any public agency for exercise, it may itself resume and exercise." (*Dyer v. Tuscaloosa Bridge Co.*, 2 Port. (Ala.) 296, 27 Am. Dec. 655; *Attorney General v. Marr*, 55 Mich. 445, 21 N. W. 883; *Chicago & N. W. Ry. Co. v. Langlade Co.*, 56 Wis. 614, 14 N. W. 844; *Brand v. Multnomah Co.*, 38 Or. 79, 84 Am. St. Rep. 772, 50 L. R. A. 389, 60 Pac. 390, 62 Pac. 209.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

From the adoption of the Constitution in 1889 until 1911 we had no general statute for the creation of new counties, but during that period thirteen new counties were created, each [1] by special Act of the legislature. By Chapter 112, Laws of 1911, there was written into the statutes of this state a general law of uniform operation, providing for the creation, organization and classification of new counties. That Act was amended in 1913, and the amended Act superseded by another of the same general character, in 1915 (Chap. 139, Laws 1915). Under these Acts twelve counties were created, organized, classified and are now existing political subdivisions of the state: Without expressly repealing the general law, the fifteenth legis-

lative assembly passed Senate Bill 76 (Chap. 56, Laws of 1917)—a special Act—creating Carter county and providing for its organization and government. This Act became a law without the approval of the Governor, pursuant to section 12, Article VII, of the Constitution. The present proceeding was instituted to test the validity of the Act, and it is the contention of relator that it violates the provisions of section 26, Article V, of the Constitution. That section forbids special legislation upon any one of the thirty-four enumerated subjects, among them locating or changing county seats, regulating county or township affairs, and concludes: "In all other cases where a general law can be made applicable, no special law shall be enacted."

Assuming the mandatory and prohibitory character of this last provision, respondents insist nevertheless that it is addressed to the legislature exclusively; that whether a general law can be made applicable to any given case must be determined by the legislature from facts and circumstances as they are made to appear to it, and that the courts cannot review the evidence before the legislature, and therefore cannot overrule or reverse the legislative determination; that the enactment of a special law upon a given subject is a legislative determination that a general law cannot be made applicable to it; and that such determination must of necessity be final and conclusive. Adjudicated cases sustaining these propositions generally are cited almost without number.

The concluding sentence of section 26 above is not an absolute prohibition in the sense that the preceding section is. Section 25 is absolute in its terms. It means that under no possible set of circumstances may a law be revised or amended by reference to its title only, and any Act passed in violation of its provisions is absolutely void. The concluding sentence of section 26 does not prohibit special legislation altogether, but does seek to curtail it. It forbids special laws in all cases where general laws can be made applicable. But who shall determine whether a general law can be made applicable in any

given instance? Upon this question the decisions are in hopeless conflict, and no useful purpose can be served by reviewing them at length. The cases cited by respondents hold that the question is one exclusively for legislative determination, while cases cited by relator hold with equal emphasis that it is one for decisions by the courts. We might relieve ourselves of much work and worry by accepting one theory or the other, and, blindly following precedent, content ourselves with merely [2] citing the authorities. The decisions of other state courts are not binding upon us. They are useful or persuasive with us, or they are not, according to whether the reasoning appeals to our judgment or fails to do so. We are not at liberty to abdicate in favor of some other tribunal, but conceive it to be our duty to determine every controversy presented to us according to our own best judgment, enlightened to the utmost extent possible by the learning and experience of other courts and by textwriters who have specialized upon particular subjects.

In this instance we find ourselves unable to agree entirely with either theory established by the adjudications to which reference has been made. We have on our statute books a general law, of uniform operation throughout the state, which forbids gambling. If the legislature should be unwise enough to substitute for this law another of the same character, but which by its terms applied only to certain named counties, excluding all others, we imagine no one would hesitate to pronounce such an Act unconstitutional and void; and neither can we imagine that it could be urged with any semblance of reason that it was for the legislature to determine finally that a general anti-gambling law cannot be made applicable throughout this state. It is inconceivable that there is such a different standard of morality prevailing in different sections of the state that a police regulation of this character cannot be made to operate uniformly. Examples might be multiplied to illustrate the view that it cannot be exclusively a legislative question to determine in every instance whether a general law can be made applicable.

On the other hand, we think the theory that it is a judicial question in every instance equally fallacious. To illustrate by an extreme case: Suppose there is a county in this state, no portion of which is adapted to agriculture, but which does contain extensive grazing areas; that in the remainder of the state agricultural development has progressed to that point where a herd law is imperatively demanded, and the legislature is responsive to the demand and seeks to promote the welfare of the state by the enactment of a suitable law restraining livestock from running at large. If the legislature ascertains that the facts are that the range county is so far bounded by mountain ranges and rivers that stock running at large therein will not jeopardize the interests of any other section, then it would seem that common sense would dictate to the lawmakers that a statute be enacted restraining livestock from running at large, but excepting from the operation of its provisions the range county. Such an Act would meet the demands of every section of the state, promote the general welfare, and infringe the rights of no one; but it would be special legislation. A herd law could be passed which would be general and uniform in its operation throughout the state, and which, in addition to promoting the interests of forty counties, would also destroy the principal industry of the one. Indeed, it is conceivable that a general law can be enacted upon any subject of legislation; but, if this be the sense in which the language is employed in the concluding sentence of section 26, then its ultimate purpose is to prohibit special legislation altogether.

We believe there are many subjects of legislation, which, from their inherent character, are subject to regulation by general laws, and that the courts are as advantageously situated as any other department of government to say so; on the other hand, there are certain subjects which may or may not lend themselves to regulation by general laws, depending upon extrinsic facts and circumstances which the Legislature is peculiarly fitted to ascertain and determine, but which the courts have no means

available to ascertain. Upon the first class of subjects, the courts can and must determine the applicability of general laws; upon the second, the legislature must be left free to act.

The creation of new counties involves a question of public [3] policy exclusively. It would have been perfectly competent for the people, in adopting their Constitution, to have made provision that the state should be divided into the sixteen counties then in existence, and prohibited the formation of any new counties thereafter. It would have been a very unwise thing to do, and it was not done. The debates of the constitutional convention disclose an attempt to write into our fundamental law a property restriction upon the creation of new counties; but the attempt failed, and the sense of the convention, so far as it is disclosed, was in favor of the widest liberality toward growing communities aspiring to local self-government. In the creation of new counties there are certain considerations which address themselves to the legislature, common to all alike—the financial ability of the community to support county government and the effect which the withdrawal of one portion of a county may have upon the capacity of the old county to continue its organization. If these and like questions were the only ones which could arise, the applicability of a general law to the creation of new counties would seem a demonstrable fact; but they are not. In the early history of the state we had certain sections of vast territorial extent, but with small population and little taxable wealth; others with congested population and vast wealth, but with little territory tributary. In many of the states on the plains it might be possible to lay off counties with a foot rule—to follow township and range lines and achieve practical results; but in a mountainous country, with navigable streams, such as this, so simple a plan could not well be applied. The topography of the country, the accessibility of one portion to another, the lines of transportation, the stability of the community, the opportunities for growth and development, are considerations which must enter into the discussion of any plan for county organization here.

As remarked before, it was possible for the first state legislature to enact a general law for the organization of new counties. The same general law enacted in 1915 could have been enacted in 1891, but it would have been a useless piece of encumbrance upon the statute books. It would have prohibited the formation of any new counties for many years, and would have retarded the development of the state to an almost unlimited extent. It was likewise possible to enact a general law with such liberal provisions that any aspiring community in the state, then or thereafter, could have secured separate county government. But the possibility of enacting a general law for new county organization is not the test prescribed by the Constitution. In order to bar special legislation, the general law must be applicable, and in our opinion that word was employed in a very general and comprehensive sense. The framers of our Constitution were not idle dreamers. They were eminently endowed with practical common sense. Their discussions in convention disclose a fixed purpose to avoid legislating, and to confine their efforts to the enunciation of those fundamental principles deemed essential to the stability and general welfare of the commonwealth. They recognized that the Constitution was intended to be, not a grant, but a limitation, of power, and they left the legislative department free to exercise its law-making function, subject only to such limitations as were deemed necessary to be imposed. They wrote with peculiar perspicuity and terseness, and never intended their language to be given a strained or unreasonable interpretation. When they referred to a general law as applicable to a particular case, they meant a law in its practical operation adequate to the purpose for which it was intended. In this sense, whether a general law can be made applicable to the creation of new counties depends upon a multitude of extraneous facts and circumstances, which the legislature, operating without the fixed rules of judicial procedure, is peculiarly qualified to ascertain and pass upon, but which the courts can but inadequately ascertain, if at all.

Our conclusion upon this branch of the case is that with respect to the particular subject—the creation of new counties—

it was peculiarly the province of the legislature to determine at all times between 1889 and 1911 whether a general law could be made applicable, and that the failure or refusal to enact a general statute upon the subject is tantamount to a decision that such a statute could not be made applicable.

But it is said that our experience under the general law has demonstrated its applicability, and that a decision of the question has been set at rest by the legislature itself. At first blush this suggestion seems to afford a solution for the problem presented; but no Act of a legislative assembly is irrepealable, and though the general law may have served the purpose intended during the six years succeeding its enactment in 1911, it was altogether competent for the last legislative assembly to determine that it has spent its force and is no longer adequate to the purpose for which it was enacted. It might have determined that with the creation of the twelve new counties, the physical and topographical conditions of the state no longer admit of its practical application, and that at the present state of our history and development no general law upon that subject can be made to serve the best interests of the commonwealth. Had it so declared by repealing the general law, we should not deem it within the province of this court to attempt to interfere, and if, with the general law repealed, it had then passed the special act creating Carter county, we should have accepted its determination that a general law could not be made applicable as conclusive upon us.

But it is insisted that the general law was not repealed, and that under its provisions new counties may now be created, if they can meet the requirements which its terms impose. But if no community in the state can now or hereafter meet those requirements, instead of being a law for the creation of new counties, it becomes a law prohibiting the formation of new counties. In other words, it has ceased to fulfill the purpose for which it was enacted. It has ceased to be applicable to the subject in the constitutional sense.

If the legislature possessed the power and authority, by repealing the general law, to say that a general statute cannot

now be made applicable to the creation of new counties, it likewise possessed the authority to declare the same result by the enactment of this special law. We will not indulge the presumption that the legislative assembly wittingly violated the Constitution; but, assuming that it is necessary to do so in order to uphold the validity of the Act in question, we will presume that due consideration was given to the concluding sentence of section 26, and that the enactment of this special law was the means employed to express the legislative determination that the general law is no longer applicable to the creation of new counties under the conditions as they now exist. The same conclusion might have been expressed more lucidly by repealing the general law outright; but, if the determination was reached, the particular means by which it was expressed is of no moment.

In passing, we may observe that there are certain provisions contained in the Act creating Carter county which are clearly invalid; but they refer to incidental matters, and may be eliminated without impairing the Act as a whole. It is inconceivable that they could have operated as inducements to the passage of the Act, or that without them the measure would not have received favorable consideration at the hands of the legislature.

The demurrer to the complaint is sustained, and the proceeding is dismissed.

Dismissed.

MR. CHIEF JUSTICE BRANTLY: I concur in the conclusion reached by Mr. Justice HOLLOWAY, but do so on the ground that I am not satisfied that the injunction found in section 26, Article V, of the Constitution, is addressed to the judicial department of the government. The creation of new counties is a matter of public policy. The propriety of creating one at any time depends upon fact conditions as they exist at that time. These the legislature can more readily ascertain and weigh than the courts. I therefore incline to the opinion that the injunction is addressed exclusively to the legislature, and hence that the Act in question must be upheld.

MR. JUSTICE SANNER: Heartily subscribing to the doctrine, so often announced by this court, that in testing the constitutionality of an Act of the legislature the question is not whether it is possible to condemn, but whether it is possible to uphold, and accepting, for the most part, the reasoning of Mr. Justice HOLLOWAY in the above opinion, I am nevertheless unable to assent to all of it or to the conclusions announced. Briefly stated, my reasons are these:

The injunction expressed in the final clause of section 26, Article V, is prohibitory (Const., sec. 29, Art. III) and—if the Constitution is to have any force at all—is binding upon the legislature, the courts and every other agency engaged in the government of this state. The language of section 26, Article V, is simple, direct and plain; no resort to authority for its interpretation is required; he who runs may read it. Its purport is that in certain enumerated cases no special Act shall ever be passed, nor shall such Act be passed in any other case to which a general law can be made applicable; in other words, the prohibition is absolute as to the thirty-four enumerated cases and conditioned in every other only upon the fact that a general law can be made applicable to the subject matter. Why the prohibition was inserted is perfectly clear. To pass an Act for a given case is easy; to frame general legislation, which shall operate justly upon divergent conditions, requires time and thought; unchecked legislation has always tended to degenerate into the easier courses of specialism, log-rolling, action upon the theory that the legislators have favors to exchange, instead of duties to perform; and the purpose of the prohibition is to furnish the check necessary to prevent just this sort of degeneration.

Confessedly, the Act creating Carter county is a special one. When it was passed we had, and I think still have, a general law upon the statute books relative to the creation of new counties; so “applicable” to the subject has that law been that twelve new counties have been created under it. Its enactment and successful operation furnish proof that the subject is one

amenable to treatment by general law; and that fact stands established unless the legislature, with power so to do, has declared that the fact no longer exists. I do not question at this time that the legislature could have so declared. What the opinion asserts, and what I deny, is that, by passing the special Act creating Carter county, the legislature did declare the general law no longer operative, thus in effect repealing it, and did declare that no general law could be made applicable to the subject under present conditions. This not only invokes the disfavored doctrine of implied repeal, but effects such a repeal of a general law by a purely special Act, a proceeding almost unheard of in the annals of jurisprudence; it is not, in my opinion, the natural inference from the enactment of the special law—such inference rather being that, since Carter county could not meet the requirements of the general law, a special case should be made of it without regard to the general law; the written record of the legislative session shows that the general law was deemed applicable to the subject of new counties, because the legislature declined three specific proposals (House Bill 51; House Bill 322; Senate Bill 68) for its amendment; the presence in the special Act of provisions admittedly unconstitutional shows affirmatively that in its enactment the legislature was not thinking of the Constitution; and finally, although every theory on which courts have relied in avoidance of provisions similar to section 26, Article V, is invoked by the respondents, the view that the special Act operates as a repeal of the general law was not exploited in the briefs or argument.

A study of the authorities cited by the respondents discloses much blind following of precedents which take no account of the "mandatory and prohibitory" character of constitutional provisions such as ours are declared to be; and these authorities lead logically to the result, which many of them express, that in every instance the applicability of a general law is a legislative question—a proposition that cannot be maintained. Then, too, some of these authorities go to the length of saying that the criterion, which is to be applied exclusively by the legis-

lature, is the applicability of a general law to the particular case, instead of the amenability of the subject presented by the particular case to treatment through general law. Such reasoning begs the whole question, and makes advisory only what the Constitution explicitly says is mandatory and prohibitory; under it the legislature could properly except a particular citizen or a particular county from the operation of the laws against homicide, upon the ground that in its judgment they do not apply to him or to it, which is an absurdity on its face.

Respondents lay emphasis on the propositions that this court has decided the creation of new counties by special Act to be permissible under the Constitution, that by the rule of *ejusdem generis* the concluding clause of section 26, Article V, can have no application to the subject of new counties, and that this section came to our Constitution from the Act of Congress approved July 30, 1886 (24 Stat. 170, Chap. 818), with interpretations, judicial and congressional, which permit the creation of new counties by special Act. The decisions of this court, to which appeal is made, were rendered before any general law for the creation of new counties was passed, before it was known that such a law could be made applicable. So far as these utterances are not pure *dicta*, they are justified by the knowledge then possessed upon the subject; possibilities, considered with reference to human action, are always conditioned upon human capacity, and this in turn upon knowledge; what is not known to be possible is, for the time being, impossible; and if, as the above opinion asserts, and as I believe, the question of the applicability of a general law to the subject of new counties was in the first instance for the legislature, the fact could not be known to the court until the experiment was tried. The rule of *ejusdem generis* cannot be applied to the provision in question, for the reason that the preceding clauses of the section refer to many subjects of legislative action, some of which belong to the same general class as the creation of new counties. The argument, whatever its sanction, based upon the source of section 26, is answered by the fact that section 26 did not come

from the Act of Congress approved July 30, 1886; it came bodily, with one slight amendment, from the proposed Constitution of 1884, as the debates of the convention which formulated our present Constitution disclose.

To my mind, the opinion written by Mr. Justice HOLLOWAY correctly assumes that the Act creating Carter county cannot be upheld on any theory other than that adopted in the opinion; and, as I think it cannot be so upheld, I must conclude that it cannot be upheld at all.

STATE, RELATOR, v. MCQUITTY ET AL., RESPONDENTS.

(No. 4,015.)

(Submitted March 26, 1917. Decided May 15, 1917.)

[165 Pac. 599.]

(For syllabus, see *State ex rel. Ford v. Schofield*, ante, p. 502.)

Original proceeding in *quo warranto* by the State against I. S. McQuitty et al. Proceeding dismissed.

Mr. S. C. Ford, Attorney General, for Relator.

Messrs. Jones & Jones, Messrs. Booth & Dousman, Messrs. Gunn, Rasch & Hall, Messrs. Galen & Mettler, and Mr. E. G. Toomey, for Respondents.

Opinion: PER CURIAM.

There is involved herein the validity of the special Act creating Wheatland county. By stipulation of the parties, the same judgment is to be entered herein as in cause No. 4005, *State ex rel. Ford v. Schofield et al.*, ante, p. 502, 165 Pac. 594. Upon the authority of that case, this proceeding is dismissed.

Dismissed.

KANE, RESPONDENT, v. KANE, APPELLANT.

(No. 3,767.)

(Submitted April 20, 1917. Decided May 15, 1917.)

[165 Pac. 457.]

Divorce—Parent and Child—Modification of Decree—Separation Agreement—Power of Court.**Divorce—Minor Children—Custody and Support.**

1. In a proceeding looking to the modification of a decree of divorce which made no provision for the custody, control and education of a minor child, the infant's welfare was of paramount consideration.

Same—Minor Children—Custody and Support—Agreement of Parties.

2. While a separation agreement entered into between husband and wife prior to divorce, by which the latter was given the custody of a minor child upon consenting to support it and releasing the former from any further contributions in that behalf, was binding upon the parties, it was not binding upon the child nor the court, which latter could require the father to contribute to the child's support notwithstanding the release, or permit him to visit it if its interests would thereby be promoted, upon condition that he first make such contribution.

[As to validity of contract made to facilitate procuring of divorce, see note in *Ann. Cas.* 1915A, 811.]

Same—Right of Father to Visit Child.

3. On a husband's petition to modify a divorce decree so as to permit him to visit his minor child, the time, place and duration of the visits, his conduct during such visits, and the extent to which he might have the child in his custody, were all proper subjects for regulation by the court.

Same.

4. Unless it appears with reasonable certainty that a divorced husband is morally unfit to associate with his minor child, he should, in view of the fact that the tie between parent and child is one of the most binding in human life and not lightly to be disregarded, be granted the privilege.

Same—Removal of Child from Jurisdiction—Power of Court.

5. In such a proceeding as the above, the court may forbid the party to whom the custody of a minor child has been awarded to remove it from its jurisdiction.

Appeal from District Court, Valley County; Frank N. Utter, Judge.

On right of divorced persons to contract as to the custody of children, see note in 15 L. R. A. (n. s.) 744.

On the question of validity of agreement between parents as to custody of children pending divorce, see note in 2 L. R. A. (n. s.) 201.

DIVORCE SUIT by Margaret A. Kane against Richard H. Kane. From an order denying a petition to modify the decree, defendant appeals. Reversed and remanded.

Messrs. Norris, Hurd & McKellar, for Appellant, submitted a brief; *Mr. Edwin L. Norris* argued the cause orally.

It is elementary that the action of the court, in cases of this nature, should be for the best interests of the child. (*State ex rel. Giroux v. Giroux*, 19 Mont. 149, 47 Pac. 798; *Pearce v. Pearce*, 30 Mont. 269, 76 Pac. 289; *State ex rel. Nipp v. District Ct.*, 46 Mont. 425, Ann. Cas. 1916B, 256, 128 Pac. 590; *Brice v. Brice*, 50 Mont. 388, 147 Pac. 164; *Crater v. Crater*, 135 Cal. 633, 67 Pac. 1049; *Bailey v. Bailey*, 17 Or. 114, 19 Pac. 844; *Kentzler v. Kentzler*, 3 Wash. 166, 28 Am. St. Rep. 21, 28 Pac. 370; *Umlauf v. Umlauf*, 128 Ill. 378, 21 N. E. 600; *Bryan v. Lyon*, 104 Ind. 227, 54 Am. Rep. 309, 3 N. E. 880; *Corrie v. Corrie*, 42 Mich. 509, 4 N. W. 213.) To the end that this result may be accomplished, the courts are given a wide range of discretion, in the proper exercise of which their decisions cannot be questioned. (*Miner v. Miner*, 11 Ill. 43; *Stetson v. Stetson*, 80 Me. 483, 15 Atl. 60; *Luck v. Luck*, 92 Cal. 653, 28 Pac. 787; *Meyer v. Meyer*, 100 Va. 228, 40 S. E. 1038; *Chambers v. Chambers*, 75 Neb. 850, 106 N. W. 993; *Dubois v. Johnson*, 96 Ind. 6; *Willcox v. Hosmer*, 83 Mich. 1, 47 N. W. 29; *Pittman v. Pittman*, 3 Or. 553; *Lusk v. Lusk*, 28 Mo. 91; *Black v. Black*, 5 Mont. 15, 2 Pac. 317.) For the good of the child and in the exercise of such discretion, the court may modify a decree previously given, regarding the custody of the child. (*Pearce v. Pearce*, *supra*; *Breedlove v. Breedlove*, 27 Ind. App. 560, 61 N. E. 797; *Burge v. Burge*, 88 Ill. 164; *Page v. Page*, 161 N. C. 170, 76 S. E. 619; *Gadsby v. Gadsby*, 65 Or. 309, 131 Pac. 1022; *Black v. Black*, 149 Cal. 224, 86 Pac. 505; *Stone v. Stone*, 158 Ind. 628, 64 N. E. 86; *Oliver v. Oliver*, 151 Mass. 349, 24 N. E. 51; *Phipps v. Phipps*, 168 Mo. App. 697, 154 S. W. 825; *Bates v. Bates*, 166 Ill. 448, 46 N. E. 1078; *Shallcross v. Shallcross*, 135 Ky.

418, 122 S. W. 223; *Andrews v. Andrews*, 15 Iowa, 423; *McGill v. McGill*, 19 Fla. 341; *Perry v. Perry*, 17 Misc. Rep. 28, 39 N. Y. Supp. 863.)

Save in exceptional cases, it is for the best interests of the child that the parent in default should be allowed to visit under proper supervision by the court. (*Burge v. Burge*, 88 Ill. 164; *Perry v. Perry*, 17 Misc. Rep. 28, 39 N. Y. Supp. 863; *Gadsby v. Gadsby*, 65 Or. 309, 131 Pac. 1022; *Bates v. Bates*, 166 Ill. 448, 46 N. E. 1078; *Powers v. Powers*, 164 App. Div. 533, 150 N. Y. Supp. 213; *Bedolfe v. Bedolfe*, 71 Wash. 60, 127 Pac. 594; *Barlow v. Barlow*, 28 Ky. Law Rep. 664, 90 S. W. 216.)

In this case the facts show that appellant's business keeps him at all times in Glasgow, which has been the home of both of the parties and the child for some time. If the child is removed from such city, the appellant's right and privilege of visitation will be lost to him. In such case it is proper that the court should make an order that the child should not be removed from Glasgow. (*Miner v. Miner*, 11 Ill. 43; *Chase v. Chase*, 70 Ill. App. 572; *People v. Paulding*, 15 How. Pr. (N. Y.) 167; *Wald v. Wald*, 168 Mo. App. 377, 151 S. W. 786; *Ex parte Ellerd*, 71 Tex. Cr. 285, Ann. Cas. 1916D, 361, 158 S. W. 1145; *State ex rel. Nipp v. District Court*, *supra*.)

Messrs. Slattery & Kline, for Respondents, submitted a brief; *Mr. John L. Slattery* argued the cause orally.

The trial court enjoys a very extensive discretion in the disposition of the minor children of the parties to a divorce action, both before and after decree, and in modifying a decree to that end, and its conclusion will not be set aside unless the record discloses a clear abuse of that discretion. In this case, to deny appellant's petition, the trial court must have believed the evidence of respondent, and if there is any evidence justifying the denial, the order refusing to modify the decree must be affirmed. (*Simmons v. Simmons*, 22 Cal. App. 448, 134 Pac. 791; *Dickerson v. Dickerson*, 108 Cal. 351, 41 Pac. 475; *Oliver v. Oliver*,

151 Mass. 349, 24 N. E. 51; *Hedrick v. Hedrick*, 128 Ind. 522, 26 N. E. 768; *Powell v. Powell*, 53 Ind. 513; 14 Cyc. 814.)

All the evidence upon which the trial court may have acted is not before the supreme court. In addition to the evidence submitted at the hearing, and in determining whether appellant should be permitted to visit the child, the trial court could consider the testimony given at the trial of the divorce case, the trial of the divorce case and the hearing on the petition having been held before the same judge. What was the testimony at the trial of the divorce case cannot be known from the record before us. As the order denying appellant's petition may have been based wholly or in part upon such evidence, the supreme court is not in a position to say that the order is erroneous. (*Simmons v. Simmons, supra*; *Crater v. Crater*, 135 Cal. 633, 67 Pac. 1049.)

Before the divorce, appellant and respondent provided for the custody and support of the child. This agreement was made as a separation agreement, and not with a divorce in mind. The agreement, therefore, is a separation agreement, and to be construed with reference to the law governing such agreements. An agreement between husband and wife for immediate separation is valid. (Sec. 3695, Rev. Codes; *Stebbins v. Morris*, 19 Mont. 115, 47 Pac. 643; *State v. Giroux*, 19 Mont. 149, 47 Pac. 798.) Such agreement may provide for the custody or support of the children during separation. (*State v. Giroux, supra*; 21 Cyc. 1592.) The fact that a divorce is thereafter obtained does not invalidate the agreement. (*Stebbins v. Morris, supra*.) A consideration is necessary as in other contracts. (21 Cyc. 1593.) The rules of construction applied to contracts and deeds in general are applicable. (21 Cyc. 1595.) One party to the agreement may not assert a claim thereunder and at the same time deny a right conferred by it. (*State v. Giroux, supra*.) Provisions in such an agreement relative to the custody or support of a child will be enforced, unless the welfare of the child demands otherwise. (*Brice v. Brice*, 50 Mont. 388, 147 Pac. 164.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On April 10, 1915, Richard H. Kane and Margaret Kane, his wife, entered into a separation agreement which, among other things, provided that the wife, in consideration of \$1,500 paid to her, relinquished all claims against the husband and his property, and agreed to support, maintain and educate the minor child, the issue of the marriage, at her own proper expense and without further cost or expense to the father. On the same day the wife was awarded a decree of divorce on the ground of extreme cruelty, but no mention whatever was made of the child. The father undertook to visit the child, but was prevented by the mother, and on May 20, 1915, he petitioned the court to modify the decree so as to permit him to see the child under such regulation as the court might impose, and to prohibit the mother from removing the child from Glasgow, where both parents then resided. In response to an order to show cause the mother answered, pleading the settlement agreement and alleging that it was understood by both parties to it that the mother was to have the exclusive custody of the child, and that the father was not to enjoy the privilege of visiting it; that the father's visits are intended to and do annoy and vex the mother, and that the father is not a fit or proper person to associate with a child of such tender years. The answer concludes with a prayer that the father's petition be denied, that the decree be modified so as to require the father to contribute to the support of the mother and child, and that the father be compelled to pay an attorney fee on account of the supplemental proceedings. At a hearing had, the father and mother testified at length. The court denied the father's petition, but made no order upon the counterpetition of the mother. From the order made, this appeal is prosecuted.

There is not any controversy over the rules of law applicable, and practically no dispute as to the facts developed at the hearing. While there is some evidence which reflects unfavorably

upon the father, it seems reasonably certain that it could not have been deemed sufficiently prejudicial of itself to warrant the order which, in effect, denies the father the right to see or communicate with his child altogether. As we understand the testimony, the mother's objection to the father's visits is not grounded upon the latter's moral unfitness to associate with the child, but rather upon the fact that such visits annoy her and interfere with her work, and particularly upon the theory that, since under the separation agreement she is compelled to support the child, the father has no right to visit it so long as he does not contribute to its maintenance, and it must have been this theory which found favor with the court.

We are unable to agree with counsel for respondent as to the character of the proceeding instituted by the father in filing his [1] petition in the court below. Whatever may have been his intention in the premises, what he actually did was to invoke the jurisdiction of the court to modify the divorce decree so as to provide for the custody, control and education of the child (subjects omitted altogether from the decree as originally rendered), as authorized by section 3678, Revised Codes. It would be difficult to conceive of a legal proceeding to regulate the father's visits to the child, independently of an order providing for its custody and control. Likewise the counterpetition of the mother, in legal effect, had the like purpose in view. It invoked the jurisdiction of the court to modify the decree so as to provide for the support and maintenance of the child. Under these circumstances, the welfare of the child should have been the paramount consideration with the court. (*Brice v. Brice*, 50 Mont. 388, 147 Pac. 164.)

Though the separation agreement is binding upon the parties [2] to it and regulates their rights and obligations *inter sese*, it is not binding upon either the child or the court. If its provisions for the care of the child are inadequate or become inadequate, the father may be called upon to supplement them by further contributions, notwithstanding the agreement by the

mother releasing him from further costs or expenses. The child is the ward of the court, and, even if the parents agreed that the father should not enjoy the privilege of seeing his offspring, the court may nevertheless authorize him to visit it if the interests of the child will be thereby promoted.

The evidence does not support the mother's contention that the father relinquished his right to see the child, or that she understood that he agreed to do so, and that such understanding on her part was a substantial inducement to her to enter into the separation agreement. She testified that though the terms of the agreement were discussed fully beforehand, she did not know that she was to have the custody of the child until the agreement was finally submitted for her signature.

The conditions under which the father's visits may be made, [3] the time, place and duration of them, his conduct during such visits, and the extent to which he may have the child in his custody, are all proper subjects for regulation by the court. It cannot be said that by the modification sought, the father gains a distinct advantage without any concomitant burden. When he submitted to the jurisdiction of the court, he was there for any proper order the court might make, and if the court requires him, as a condition precedent to his right to visit his child, that he make further reasonable contributions to its support, he will not be in any position to complain.

Since both father and mother applied for such modification [4] of the decree as would provide for the child's welfare as well as secure them in the rights to which they deem themselves entitled, and since it is apparent that the provisions of the contract are inadequate for either purpose, we think the court was called upon to make some appropriate order to meet those ends. Unless it can be said with reasonable certainty that the father is morally unfit to associate with the child, the dictates of humanity call for such regulations as will permit him to see his own offspring. "It must be borne in mind that the tie between parent and child is one of the most binding in human life, one which the law of nature itself has established. No

legislation, no judicial interpretation of legislation, should lightly disregard the reciprocal duties of this relationship." (*State ex rel. Giroux v. Giroux*, 19 Mont. 149, 47 Pac. 798.)

In our judgment, this record presents a case wherein the court failed to exercise its discretion when it should have done so, rather than a case wherein it abused its discretion.

While the court might, with propriety, forbid the mother to [5] remove the child from the jurisdiction of the court, there was no such showing made, if indeed there could be, which would justify the court in compelling the mother to reside permanently in the same city as the father may choose as his place of residence.

The order is reversed and the cause is remanded, with directions to the trial court to take such further proceedings as will result in a proper modification of the decree, in conformity with the views herein expressed.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

GOODRICH RUBBER CO., RESPONDENT, v. HELENA MOTOR
CAR CO. ET AL., DEFENDANTS; FREYLER, APPELLANT.

(No. 3,764.)

(Submitted April 19, 1917. Decided May 19, 1917.)

[165 Pac. 455.]

Corporations—Directors—Method of Resignation—Statutes.

1. *Held*, that an informal written notice delivered to the president of a corporation by one of its directors, to the effect that the writer thereby resigned his office as such, was sufficient, the method prescribed by section 3852, Revised Codes, in this behalf, being permissive—not exclusive.

[As to resignation of officers of corporations, see note in 95 Am. St. Rep. 578.]

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

ACTION by the B. F. Goodrich Rubber Company against the Helena Motor Car Company and others. From a judgment for plaintiff, defendant Herman A. Freyler appeals. Reversed and remanded.

Mr. A. P. Heywood, for Appellant, submitted a brief and argued the cause orally.

Can a director of a corporation resign in the usual way, or are the provisions of section 3852 of the Revised Codes exclusive? An examination of the authorities discloses that the resignation of appellant, placed in the hands of the president of the corporation was sufficient to relieve him of liability as such director, unless it was incumbent on him to comply with the provisions of section 3852, as contended by counsel. (3 Thompson on Corporations, secs. 3886, 4358 and cases cited.) A director may resign as such at the time without the consent of the corporation. (*Briggs v. Spaulding*, 141 U. S. 132, 35 L. Ed. 662, 11 Sup. Ct. Rep. 924.) What necessity exists in Montana for the adoption of the construction contended for by counsel for respondent,—a construction which would mean the overturning of the methods of doing business by corporations, and the manner of effecting resignations of director, which have existed throughout the United States, as well as in foreign lands, for all time?

Counsel's contention is not supported by the letter of the law,—much less by its spirit. But, if so, the rule of construction is: "When the object and desire of a statute are manifest, and to construe it literally would be to impute to the legislature an unjust and unreasonable intent, its letter must yield to its spirit." (*Murray v. New York Cent. R. Co.*, 43 N. Y. (4 Keys) 274, 3 Abb. Dec. 339; *United States v. Claflin*, 97 U. S. 546, 24 L. Ed. 1082.) "The true meaning is to be found not merely from the words of the Act, but from the cause and necessity of its being made, from a comparison of its several parts, and from extraneous circumstances." (*Hawkins v. Gathercole*, 6 De Gex, M. & G. 1, 24 L. J. (Ch.), N. S. 332; *Cincinnati Gaslight &*

Coke Co. v. Avondale, 1 West Rep. 94, 43 Ohio St. 257, 1 N. E. 527.)

Messrs. Wight & Pew, for Respondent, submitted a brief; *Mr. Chas. E. Pew* argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

On October 11, 1913, Herman A. Freyler, R. A. De Witt and Claud Robinson became directors of the corporation, Helena Motor Car Company. Freyler continued to act as such director until December 1, 1913, at which time he entered into a contract [1] for the sale of all his stock in the company and delivered to its president the following writing:

“Helena, Montana, Dec. 1, 1913.

“Board of Directors of Helena Motor Car Co., City—

“Gentlemen: I hereby tender my resignation as secretary and a director of the Helena Motor Car Company, the same to take effect at once.

Yours truly,

“HERMAN A. FREYLER.”

Thereafter, and on January 31, 1914, the company became indebted to the respondent in the sum of \$173.57, which upon demand it failed to pay, whereupon the respondent brought this action against the company, Freyler, De Witt and Robinson—joining the latter three because as directors they had failed to file the annual statement required by law and due on January 20, 1914. Freyler resisted the suit, but judgment was entered against him according to the complaint, and from that judgment he prosecutes this appeal.

The contention of the appellant was and is that by virtue of his resignation he had ceased to be a director of the company before the duty to file the annual statement accrued, and therefore cannot be held to answer for the failure in that respect; while the respondent insists that the writing above quoted was ineffective, under section 3852 of the Revised Codes, and therefore Freyler is responsible. The section referred to provides: “Any director, trustee or other officer of a corporation

may resign his office by delivering to the secretary or president of the corporation, or depositing in the postoffice, * * * addressed to the corporation, at its principal place of business, his written resignation, and filing in the office of the clerk and recorder of the county where the principal office or place of business of the said corporation is situated, a duplicate of the said resignation, together with an affidavit of the delivery or mailing of said resignation, as above specified, or an acknowledgment of service thereof and by publishing in two consecutive issues of the official paper of the county where said company may be doing business, a notice of said resignation, and the director, trustee, or other officer shall upon such filing and publication no longer be responsible for any act or default of the corporation, or of the other officers thereof, occurring after the date of said filing: Provided, however, that any director, trustee, or other officer, shall also comply with the by-laws of the corporation relating to resignations of directors or officers. This act shall apply to resident directors of foreign corporations having a place or places of business in this state, as well as to directors and other officers of domestic corporations."

The corporation had no by-laws on the subject, and it is conceded that Freyler did nothing more than to deliver the writing above mentioned to its president and thereafter to refrain from acting as an officer or director of the company. At the common law, however, this would have sufficed (3 Thompson on Corporations, secs. 3886, 4358; *Briggs v. Spaulding*, 141 U. S. 132, 35 L. Ed. 662, 11 Sup. Ct. Rep. 924), and therefore was sufficient here, unless the section just quoted prescribes an exclusive method for resigning a directorship. We do not believe that such is its effect. Its language does not clearly indicate an intention to prescribe an exclusive method, but rather indicates a mode which is permissive, designed primarily for cases where the ordinary method may not be available or where positive proof of the resignation may be desired. The section forms no part of the law imposing the duty of filing annual statements (Chapter 63, Tenth Session Laws), and there is no special

reason to believe that its provisions were enacted for the benefit of creditors. Counsel for respondent suggests that: "It prevents a man of great financial prominence, who has become a director in a corporation, from secretly resigning, and permitting creditors to make contracts with the corporation upon the strength of his supposed connection therewith, and using his previous secret resignation as a shield from liability." But we do not understand that directors are personally liable at all events for the debts of the corporation, or that the creditors deal with a corporation upon the contingent liability of its directors, effective only in case the latter fail to see that annual statements are filed. Least of all can creditors be especially concerned in the mode by which someone, on whose responsibility they could not have relied, has severed his relations with the corporation before their debt accrued or the annual statement was due.

In our opinion, the resignation of the appellant Freyler from the board of directors of the Helena Motor Car Company was sufficient. He had ceased to be a director of the company before the debt evidenced by this judgment was incurred and before the annual statement was due. Failure to file that statement, or cause it to be filed, is therefore not a wrong which can be imputed to him; and as this is the only ground on which the claim of his liability is based, it follows that the right result was not reached in this case.

The judgment appealed from is reversed and the cause is remanded, with directions to enter judgment for the appellant.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

BROCKWAY, RESPONDENT, v. BLAIR, APPELLANT.

(No. 3,768.)

(Submitted April 21, 1917. Decided May 19, 1917.)

[165 Pac. 455.]

Brokers — Commissions — Written Contracts — Construction — Ambiguity—Evidence — Instructions — Appeal and Error — Briefs—Specifications of Error.

Appeal and Error—Specifications of Error—Briefs.

1. Under paragraph X, subdivision b, of the Rules of the Supreme Court, where error in the admission or rejection of evidence is relied on by appellant, the full substance of the evidence must be quoted in his brief.

Written Contracts—Ambiguity—Evidence.

2. It is only where the terms of a written agreement are not clear and free from ambiguity that recourse may be had to the attendant circumstances in explanation of the intention of the party; one which clearly and explicitly expresses such intention is not in need of interpretation.

[As to evidence admissible to explain words used in written contract, see note in 122 Am. St. Rep. 545.]

Appeal and Error—Instructions—Briefs.

3. Alleged error in instructions given or refused is not entitled to consideration on appeal, unless the instruction is set out in full in appellant's brief.

Same—Instructions—To be Construed as a Whole.

4. All the instructions to the jury constitute the charge of the court; each paragraph must be read and considered with the context; no one of them may be segregated from the rest and urged as erroneously given.

Brokers—Commissions—Correct Instruction.

5. In an action to recover commissions on sales of automobiles, under a contract the terms of which permitted plaintiff to call for assistance from defendant if necessary to complete a sale, the court correctly instructed the jury that the former was entitled to his commissions if his endeavors were the moving cause or "instrumental" in making the sales, even though he was assisted by one of defendant's demonstrators in finally consummating them.

Appeal from District Court, Yellowstone County; Geo. W. Pierson, Judge.

ACTION by B. G. Brockway against H. B. Blair. Judgment for plaintiff and defendant appeals from it and from an order denying him a new trial. **Affirmed.**

For authorities discussing the general rule that parol evidence is not admissible to vary, add to or alter a written instrument, see note in 17 L. R. A. 270.

Messrs. Miller & O'Connor, for Appellant, submitted a brief; *Mr. J. F. O'Connor* argued the cause orally.

Unquestionably the parties in the contract in question intended to say, and did say, that unless the plaintiff made the sale he was not entitled to a commission. While we do not contend that the delivery of a car would be necessary to constitute such a sale as would entitle plaintiff to his commission, yet we do assert that the plaintiff would be required to make such a contract with the buyer on behalf of the defendant as would give the defendant the right to recover damages in case of buyer's failure to purchase. Our assertion finds support in the following language in the case of *Ormsby v. Graham*, 123 Iowa, 202, 98 N. W. 729: "Other cases hold to the rule that under a contract giving an agent authority to sell and providing a commission for such services the mere production of a purchaser who is willing to buy upon the stated terms is not sufficient, but an actual sale or binding contract of sale must be shown before a recovery can be had upon the agreement." (*Bouscher v. Larkins*, 84 Hun, 405, 32 N. Y. Supp. 305; *Dolan v. Scanlan*, 57 Cal. 261; *Hammond v. Crawford*, 66 Fed. 425, 14 C. C. A. 109, 35 U. S. App. 1; *Norman v. Reuther*, 25 Misc. Rep. 161, 54 N. Y. Supp. 152; *Keys v. Johnson*, 68 Pa. St. 42; *Haydock v. Stow*, 40 N. Y. 363; *Wilson v. Mason*, 158 Ill. 304, 49 Am. St. Rep. 162, 42 N. E. 134; *Olsen v. Jodon*, 38 Minn. 466, 468, 38 N. W. 485; *Richards v. Jackson*, 31 Md. 250, 1 Am. Rep. 49; *De Santos v. Taney*, 13 La. Ann. 152; *Dorrington v. Powell*, 52 Neb. 440, 72 N. W. 587; *Drury v. Newman*, 99 Mass. 256; *Bradford v. Menard*, 35 Minn. 197, 28 N. W. 248; 19 Cyc. 255.)

Messrs. Nichols & Wilson, for Respondent; *Mr. Harry Wilson* argued the cause orally.

The authorities do not support appellant's contention that before respondent, under the contract in question, could claim commission on any sale, he must either have actually consummated the sale or executed with the prospective purchaser a binding contract for the breach of which by the vendee the

vendor could successfully maintain an action for damages. It was only necessary for respondent to bring the parties together, and if by reason thereof a sale resulted, the commission was earned. (*Dreisback v. Rollins*, 39 Kan. 268, 18 Pac. 187; *Desmond v. Stebbins*, 140 Mass. 339, 5 N. E. 150; *Reishus-Remer Land Co. v. Benner*, 91 Minn. 401, 98 N. W. 186; *Hubachek v. Hazzard*, 83 Minn. 437, 86 N. W. 426; 19 Cyc. 258.)

A broker who introduces the purchaser is entitled to commissions where the negotiations are suspended but subsequently resumed and a sale is made. (*Van Doren v. Jelliffe*, 1 Misc. Rep. 354, 20 N. Y. Supp. 636.) If a broker who has property for sale is instrumental in bringing the owner of the property and a purchaser together, and a sale or exchange is effected by the parties in interest, the broker will be entitled to his commission. (*Miller v. Stevens*, 23 Ind. App. 365, 55 N. E. 262; *Cox v. Haun*, 127 Ind. 325, 26 N. E. 822; *Henderson v. Mace*, 64 Mo. App. 393.) A broker is entitled to a commission where he is the procuring cause of a sale, though the sale is actually consummated by the owner. (*Hardin v. Stansel*, 13 Ga. App. 22, 78 S. E. 681; *Webb v. Harding* (Tex. Civ.), 159 S. W. 1029.) A broker is deemed the procuring cause of the sale where his intervention is the foundation on which the negotiations resulting in a sale are begun. (*Cleveland & Williams v. Butler*, 94 S. C. 406, 78 S. E. 81; *Charles v. Klingstein*, 50 Colo. 406, 115 Pac. 704; *Grinnell Co. v. Simpson*, 64 Wash. 564, 117 Pac. 391; *Sidebotham v. Spengler*, 154 Mo. App. 11, 133 S. W. 101; *Jennings v. Trummer*, 52 Or. 149, 132 Am. St. Rep. 680, 23 L. R. A. (N. S.) 164, 96 Pac. 874.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In this action, plaintiff seeks to recover commissions alleged to be due upon the sale of three automobiles, under the following written agreement:

“This agreement made and entered into this 5th day of May, 1913, by and between H. B. Blair, of Livingston, and B. G.

Brockway, of Billings, Montana, as follows: The said first party agrees to furnish Reo automobiles for the said second party to sell in Yellowstone and Carbon counties in the following manner: The said second party to get fifteen per cent (15) of sales. Said first party to furnish all automobiles on deposit of one hundred dollars (\$100.00) each, at time of order. All orders and specifications to be in Lansing ten days prior to shipment.

“H. B. BLAIR,

“First Party,

“By R. H. BISHIR,

“B. G. BROCKWAY,

“Second Party.”

The circumstances under which a car was sold to Allard, one of the purchasers, will illustrate the three sales involved in this controversy. Cettergren was Brockway's agent at Laurel, and Bishir and Green were Blair's agents who worked to some extent in that vicinity. Cettergren testified that he made several trips to see Allard concerning the sale to him of a Reo car; that he demonstrated the car to Allard several times; that he took Bishir to Allard, and Bishir demonstrated the car to him; that afterward and on the day Allard expressed his intention to purchase a car he introduced Green to Allard; that a sale was then completed by Green, who delivered the car to Allard. On cross-examination, the witness said: “I know that Mr. Green would not have sold the car if it hadn't been for me, and I think I would have sold the car if it hadn't been for Green. Mr. Allard said he was ready to buy a car before Mr. Green spoke to him.” From the fact that a general verdict was returned in favor of plaintiff, we must assume that the jury accepted this testimony as true, so far at least as it tends to disclose the part which Brockway's agent played in effecting the sale. It is apparent that the efforts of Cettergren alone did not produce the sale, neither did the unaided efforts of Blair's agent effect it. The sale resulted from their combined efforts.

Upon the theory that the agreement does not in terms expressly cover the case, the court permitted evidence to be intro-

duced to the effect that it was understood by both parties, at the time the contract was executed, that Brockway was not expected to go out and complete the sales by his own unaided efforts; that if it was necessary for him to have the assistance of Blair's agents in the community to close or complete a sale, such assistance would be furnished as a part of Blair's obligation under the contract; and that this understanding was carried into effect in making the sales which furnish the foundation for this controversy. The admission of this evidence is specified as error—as violating the provisions of sections 5018 and 7873, Revised Codes, which, so far as applicable here, are to the effect that, when the terms of an agreement have been reduced to writing by the parties, no evidence is admissible of [1] the terms of the agreement other than the contents of the writing itself. “The full substance of the evidence admitted” is not quoted as required by Rule X, subdivision “b,” of the rules of this court (123 Pac. xii), and the attention of counsel is directed to the fact that these rules are to be honored by their observance—not by their breach.

It is the contention of appellant that, under the terms of the agreement, Brockway was not entitled to any commission unless and until he made a sale complete in itself or made a contract of sale under which Blair could maintain an action for damages in case the prospective purchaser failed or refused to take the car. In other words, it is appellant's contention that the terms of the contract are explicit; that they interpret themselves and leave no room for the application of rules of construction or the introduction of evidence explanatory of the circumstances under which the agreement was made.

If the sale had been made by the unaided efforts of Brockway or his agent, there could not be any question of plaintiff's right to the commission. If the sale had resulted from the unaided efforts of Blair's agents, Brockway could not lay claim to the commission, for the contract did not give him exclusive territory. But what are the rights of the parties under the contract as they apply, or can be made to apply, to the Allard

sale? Sections 5018 and 7873, above, refer to contracts complete in themselves and free from ambiguity and uncertainty. Sections 5025, 5030, 5036 and 5038 provide rules of interpretation where the terms of the agreement fail to explain themselves [2] fully or are ambiguous or uncertain. If the language of the agreement is clear and expresses the intention of the parties explicitly, it needs no interpretation (*Ming v. Pratt*, 22 Mont. 262, 56 Pac. 279); but, if it is not clear and free from ambiguity, then the attendant circumstances under which the contract was made may be examined to furnish a key to the intention of the parties (*Alywin v. Morley*, 41 Mont. 191, 108 Pac. 778; *Quirk v. Rich*, 40 Mont. 552, 107 Pac. 821). We are not prepared to agree with counsel for appellant that the meaning of the language of this agreement is so far free from doubt that it can be said as a matter of law that it furnishes its own interpretation. That the writing does not contain all the terms of the agreement is apparent at once. Neither the price at which the cars were to be sold nor the terms of sale are specified. Certainly, it was not intended that Brockway might fix any price upon the cars or any terms which would suit him or better enable him to sell them. It is uncertain, too, whether Brockway was to order cars from Blair or directly from the factory. Indeed, the writing appears to be nothing more than a brief memorandum of certain points of their agreement, and the court ruled correctly in admitting the evidence.

Upon the facts found, Brockway was entitled to his commission upon these sales, for the parties had agreed that such assistance as was given him was due to him under the contract.

The second assignment is that the court erred "in giving [3] defendant's instruction No. 2½." The instruction is not set out as required by Rule X, subdivision "b." The defendant below is the appellant here, and we would be justified in refusing to consider the assignment because of this violation of the rule, or we might content ourselves with saying that a party will not be heard to complain of the action of the court in giving an instruction which he requests; but waiving the failure

to observe the rule, and assuming, from the argument presented, that fault is found with plaintiff's offered instruction No. 1, given as instruction No. 4, and that the reference to defendant's instruction No. 2½ is merely an error, it is to be observed that, if instruction No. 4 stood alone and was the sole criterion for determining the circumstances under which plaintiff would be entitled to commission upon a sale in the making of which he received assistance from defendant, then there would be ground for appellant's complaint. The phrase, "was instrumental in making any sale," conveys practically no meaning. It is too indefinite to be of service to the jury in applying the evidence; [4] but one particular paragraph of the entire charge cannot be segregated from the rest. Every paragraph is to be read with the context, and all the instructions considered together as constituting the single charge of the court. (*Stephens v. Elliott*, 36 Mont. 92, 92 Pac. 45; *Michalsky v. Centennial Brewing Co.*, 48 Mont. 1, 134 Pac. 307.)

At the instance of defendant, the court gave the following [5] instruction: "You are instructed that, in order for the plaintiff to recover by reason of any sale being made by him, you must find that the plaintiff was the moving cause of the sale being effected, and that the sale would not have been made had it not been for the solicitation and efforts of the plaintiff." The court intended, and the jury must have understood, that these two instructions should be considered together as stating the circumstances under which the plaintiff would be entitled to the commission even though he received assistance from the defendant or his agent in completing the transaction. The two instructions are not incongruous or contradictory. The term "instrumental" is defined by the court to mean such contribution by the plaintiff as that, without it, the sale would not have been made. In other words, the plaintiff must have been the moving cause which produced the sale or the procuring cause of the sale. (*Armstrong v. Wann*, 29 Minn. 126, 12 N. W. 345, approved in *Shober v. Blackford*, 46 Mont. 194, 127 Pac. 329.) We think the jury could not have been misled, and that the

evidence is sufficient to make out a case under the rule thus announced.

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

SOMMERS, APPELLANT, v. GOULD, RESPONDENT.

(No. 3,771.)

(Submitted April 23, 1917. Decided May 23, 1917.)

[165 Pac. 599.]

Election Contest—Attorney's Fee—Residence—Declarations—Admissibility—Correctness of Returns—Presumptions.

Election Contest—Attorney's Fee.

1. Where the contestant in an election dispute fails to make out a *prima facie* case, he may be taxed with a reasonable attorney's fee in favor of the contestee.

Same—Residence—Evidence—Declarations—Admissibility.

2. The residence of a voter is to be determined from his acts and intent; it may be established by circumstantial evidence, as well as by his declarations touching the subject, if a part of the *res gestae*, or if made in disparagement of his right to vote, at or before the election.

Same—Lack of Qualifications—Presumptions.

3. Slight proof of the lack of any necessary qualification to vote is sufficient to overcome the presumption arising from registration or previous voting, and calls for evidence in affirmation of the voter's qualifications, from the party who would benefit from the vote.

Same—Residence—*Prima Facie* Case.

4. By establishing as a fact that a voter's family resided in a city ward other than the one in which he voted, contestant made out a *prima facie* case against the voter's right to vote where he did cast his ballot.

[As to "residence" as synonymous with "domicile" in statute regulating qualifications of voter, see note in *Ann. Cas.* 1915C, 792.]

Same—Correctness of Returns—Evidence.

5. Until impeached, election returns furnish *prima facie* evidence of their correctness.

Appeal from District Court, Madison County; W. A. Clark, Judge.

ELECTION CONTEST by Fred W. Sommers against Merton S. Gould. From a judgment of dismissal and an order denying him a new trial, contestant appeals. Reversed and remanded.

Mr. M. M. Duncan and *Mr. Henry C. Smith*, for Appellant, submitted a brief; *Mr. Smith* argued the cause orally.

“The fact of a voter’s residence can be proved by others than the voter.” (Paine on Elections, sec. 59; *State v. Marshall*, 45 N. H. 281.) “By a removal from one election district to another within ten days before election, a person otherwise qualified loses his right to vote, since a citizen must have resided in the district where he offers to vote at least ten days before election.” (*In re McDaniels*, Brightly Election Cases, 238, 3 Pa. Law Journal, 310.) The place where a man’s family resides is ordinarily his place of residence. (Paine on Elections, sec. 48; *Berry v. Hull*, 6 N. M. 643, 30 Pac. 936.)

Evidence of the conduct or declarations of a voter, afterward as well as before the day of voting, may be received to ascertain his intentions as to his place of residence on that day. (McCrary on Elections, sec. 106; Paine on Elections, sec. 773; *People ex rel. Smith v. Pease*, 27 N. Y. 45, 84 Am. Dec. 242; *State v. Olin*, 23 Wis. 309, 319; *French v. Lighty*, 9 Ind. 475, 478.)

“Domicile is often a question of intent, and the declarations of an elector, made at the time of voting, are admissible as part of the *res gestae*, and when made previous to that time, if in disparagement of his right.” (*Boyer v. Teague*, 106 N. C. 576, 19 Am. St. Rep. 547, 11 S. E. 665; *Lane v. Bailey*, 29 Mont. 548, 75 Pac. 191; *Patton v. Coates*, 41 Ark. 111; *Beardstown v. Virginia*, 81 Ill. 541; *Sharp v. McIntire*, 23 Colo. 99, 46 Pac. 115; *Black v. Pate*, 130 Ala. 514, 30 South. 434; 15 Cyc. 292, 422.)

The privilege of not answering for whom he voted was a personal one, and could have been waived by Webb. (*Lane v. Bailey*, *supra*; 15 Cyc. 424, and cases cited.) If the elector himself chooses to make his vote public, it is no concern of any

candidate for office. (*People v. Cicott*, 16 Mich. 283, 97 Am. Dec. 141; 15 Cyc. 423.) But this protection extends to legal voters only. (15 Cyc. 424; McCrary on Elections, sec. 492; *People v. Cicott*, *supra*; *State ex rel. Heath v. Kraft*, 18 Or. 550, 23 Pac. 663.)

Messrs. Callaway & Beckett, for Respondent, submitted a brief; *Mr. Lou L. Callaway* argued the cause orally.

Where one registers as a voter and votes upon that registry, the place where he registered and voted must be deemed his residence until it is shown that he has acquired another residence. Until he changes residence as defined in the statute, he retains his residence where he registered and voted. It being conceded that Webb and Twitchell were registered, and that they voted in the precincts where they were registered, the presumption is that they retained their residence and voted properly until the presumption is overcome by proof which is clear, satisfactory and convincing.

It is the general rule that a person who has voted is presumed to have been qualified until the contrary is proved. (*Dale v. Irwin*, 78 Ill. 170; *Moss v. Patterson*, 40 Kan. 720, 20 Pac. 454.)

We can see no good reason to cite cases relating to what constitutes residence or how it may be proved, and base our assertion upon what this court has said in *Carwile v. Jones*, 38 Mont. 590, 101 Pac. 153. If it were useful to cite cases from other jurisdictions, the woodchopper case—*Smith v. Thomas*, 5 Cal. Unrep. 976, 52 Pac. 1079—is much nearer in point than any which appellant has cited.

It is a general principle that a mere change of residence is not sufficient to acquire a domicile elsewhere, unless it is intended to be permanent. A mere temporary absence for a temporary purpose does not result in an abandonment of a domicile. (10 Am. & Eng. Ency. of Law, 2d ed., sec. 600; *Huston v. Anderson*, 145 Cal. 320, 78 Pac. 626.)

When the legality of a vote is in doubt, the voter cannot be compelled to disclose how he voted. (*People v. Cicott*, 16 Mich. 283, 97 Am. Dec. 141; McCrary on Elections, sec. 492.)

The court properly struck out the hearsay testimony as to what Webb and Twitchell were said to have told concerning the way they voted. The great weight of authority is to the effect that such testimony is inadmissible. (*Gilliland v. Schuyler*, 9 Kan. 569; *People ex rel. Dean v. Commissioners*, 7 Colo. 190, 2 Pac. 912; *Berry v. Hull*, 6 N. M. 643, 30 Pac. 937; *Lauer v. Estes*, 120 Cal. 652, 53 Pac. 262; *Smith v. Thomas*, 121 Cal. 533, 54 Pac. 71; *Rucks v. Renfrow*, 54 Ark. 409, 12 L. R. A. 362, 16 S. W. 6; *Edwards v. Logan*, 114 Ky. 312, 70 S. W. 852, 75 S. W. 257.)

A legal voter may refuse to testify. (*Lane v. Bailey*, 29 Mont. 548, 75 Pac. 191; *Pedigo v. Grimes*, 113 Ind. 148, 13 N. E. 700.) If section 52, page 614, Laws of 1913, be invalid, then even an illegal voter cannot be compelled to testify as to how he voted when such a disclosure would tend to criminate him. (*Tunks v. Vincent*, 106 Ky. 829, 51 S. W. 622; *Scholl v. Bell*, 125 Ky. 750, 102 S. W. 248.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

At the election held in the town of Twin Bridges in April, 1915, A. J. Wilcomb and Merton S. Gould were rival candidates for the office of mayor. The canvassing board returned that Wilcomb received eighty-two votes and Gould eighty-three, and a certificate of election was thereupon issued to Gould. Fred W. Sommers contested Gould's election, upon the ground that two illegal votes were cast and counted for Gould in ward 1, and that such votes were cast by Eli Twitchell and Roland A. Webb, neither of whom, it is alleged, was a resident of that ward at the time. Gould answered, and denied that he had any knowledge or information sufficient to form a belief as to whether Wilcomb received eighty-two legal votes, or any

greater number than seventy-nine; admitted that the canvassing board returned that Wilcomb received eighty-two votes, and denied that any illegal votes were cast or counted for him. Upon the trial it was admitted that Twitchell and Webb were both registered in ward 1 and both voted in that ward. Touching the qualifications of these two voters, the contestant offered evidence to the following effect:

Webb is a single man, about twenty-three years old. For seven or eight months prior to the election in question he was working on a ranch about ten miles from Twin Bridges. During that time he came to Twin Bridges occasionally, and stopped either at the Duella rooming-house, in ward 3, or at the Stark Hotel, in ward 2; but in either instance he occupied a room provided for him by his employer.

Sommers testified that he has lived in Twin Bridges for twenty years, and in ward 1 for eight years; that at the time of this election he was an alderman for ward 1; that there are only about eighty voters in the ward, and that he knows them all personally; that he knows Webb; that he knows that Webb did not live in ward 1 for at least a year prior to the election in April, 1915.

Wilcomb testified that he has lived in Twin Bridges continuously for seventeen years; was mayor of the town from May, 1913, to May, 1915; that he lived in ward 1 at the time of the election in question; that he is well acquainted in the town, which has a population of only about 500; that he has known Webb for five or six years; that he knew him first when he lived on a ranch near Twin Bridges, but outside the corporate limits of the town; that he knew him afterward, when he lived in Sheridan and Rochester; that in the summer of 1914 he worked in ward 1 and took his meals at a hotel in that ward, but had his room and slept in ward 3; and that he has never lived in ward 1 to the knowledge of the witness.

Gallahan, a judge of election in ward 1, testified that Webb came to the polling place on election day, ostensibly for the purpose of voting; that, when asked where he roomed, he re-

plied at the Stark Hotel; that, when questioned concerning his right to vote in ward 1, "He said he did not know whether he had a right to or not," and, when asked upon what theory he sought to vote in that ward, he replied, "We have some lots up town"; that he left, but returned soon afterward, and discussed his right to vote further, but again went away; that he came for the third time, and, having taken and subscribed the statutory oath required of challenged voters, received his ballot and cast his vote.

Concerning Twitchell's residence, Sommers, Wilcomb and Harvey testified that Twitchell has a house in ward 1, where he lived for a year or more prior to the fall of 1914; that he then moved his family into two small rooms in ward 3, where they have since lived, and where they cook, eat and sleep; and that, since they moved, their house in ward 1 has been rented to other parties, who have occupied it. After they moved, and before election, Twitchell asked Wilcomb whether an elector, who removes after registering, must re-register in order to vote, and Wilcomb understood from the circumstances that Twitchell was referring to himself.

Upon this evidence, offered by the contestant, the court held that a *prima facie* case of nonresidence had not been made out against either Webb or Twitchell, excluded evidence as to how either voted, and entered judgment dismissing the contest, and awarding contestee his costs and an attorney fee, amounting in the aggregate to \$323.90. From the judgment, and from an order denying a new trial, contestant appealed. The term of office involved herein has expired, and the controversy now involves only the question of costs.

If the court was correct in holding that contestant did not [1] make a *prima facie* case, it was correct in taxing against him a reasonable attorney fee. (*Doty v. Reece, ante*, p. 404, 164 Pac. 542.) Whether contestant shall be held for this judgment for costs depends upon the answer to the inquiry: Did he make out a *prima facie* case that Webb and Twitchell were not legal residents of ward 1 when they voted therein on April

5, 1915? To constitute either of these men a legal voter, he must have resided within the state a year (sec. 462, Rev. Codes), within the town six months, and within the ward thirty days, immediately preceding the election (sec. 3231, Rev. Codes).

It would be extremely difficult to give a comprehensive and accurate definition of the term "resident" as used in our election laws. The statute does not attempt to define it, but does describe certain rules for determining in the first instance whether a voter is a legal resident of the precinct or ward where he votes. Section 24 of an Act approved March 8, 1915 (Laws 1915, p. 263), sets forth eleven rules designed to aid registration and election officers in determining the residence of a prospective voter. Of necessity, these rules are very general in their terms, and furnish but uncertain assistance at the best. Rule 1 provides: "That place must be considered and held to be the residence of a person in which his habitation is fixed, and to which, whenever he is absent, he has the intention of returning." (Page 273.) Under rules 4 and 5 a person will not be deemed to have lost his residence by reason of his absence for temporary purposes only. Rule 8: "The place where a man's family resides is presumed his place of residence." Rule 9: "A change of residence can only be made by the act of removal joined with the intent to remain in another place. There can only be one residence. A residence cannot be lost until another is gained." (Page 274.)

The residence of a voter is to be determined from his acts [2] and intent; but this fact, like any other fact involved in a civil action or proceeding, may be established by circumstantial evidence, and any declarations of the voter touching the subject, if a part of the *res gestae*, or any declarations in disparagement of his right to vote, if made at or before the election, may be received in evidence. (*People ex rel. Boyer v. Teague*, 106 N. C. 576, 19 Am. St. Rep. 547, 11 S. E. 665; *Behrensmeyer v. Kreitz*, 135 Ill. 591, 26 N. E. 704; 15 Cyc. 292; 9 R. C. L. 1032.)

From the fact that Webb registered in ward 1, there arose [3] a presumption in favor of his right to vote there. To overcome this presumption involved the proof of a negative, and in such case the same high quality of evidence is not required as is ordinarily necessary to prove an affirmative fact. The rule generally recognized is that slight proof of the lack of any necessary qualification to vote is sufficient to overcome the presumption arising from registration or voting, and calls for evidence in affirmation of the voter's qualifications from the party who would benefit from the vote. (*People v. Pease*, 27 N. Y. 45, 84 Am. Dec. 242; *Beardstown v. Virginia*, 76 Ill. 34; 5 Ency. of Evidence, 116.) To determine the sufficiency or insufficiency of evidence to establish the residence or nonresidence of a voter requires a more or less arbitrary application of the rules of law to the facts presented, and though the evidence tending to impeach Webb's right to vote in ward 1 is not very clear and convincing, we think it is sufficient to make out a *prima facie* case. (*State ex rel. Hopkins v. Olin*, 23 Wis. 309.)

The evidence touching Twitchell's residence is much more [4] substantial. His family resided in ward 3, and, when this fact appeared, the contestant made out a *prima facie* case against his right to vote in ward 1. (*Carwile v. Jones*, 38 Mont. 590, 101 Pac. 153; Rule 8, above.)

It was not necessary for the contestant to show the number [5] of legal votes cast for Wilcomb. Neither the correctness of the canvassing board's return nor the validity of any votes so returned is questioned by the answer. The admission that the board returned that Wilcomb received eighty-two votes is, under the circumstances, tantamount to an admission that he received that number of votes. Until impeached, the returns furnish *prima facie* evidence of the correctness of the result so returned. (15 Cyc. 418.)

The judgment and order are reversed and the cause remanded for further proceedings.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

**BUHLER ET AL., RESPONDENTS, v. LOFTUS ET AL.,
APPELLANTS.**

(No. 3,770.)

(Submitted April 21, 1917. Decided May 26, 1917.)

[165 Pac. 601.]

*Equity — Cancellation of Instruments — Fraud — Complaint—
Sufficiency—Amendments—Reply—Evidence — Presumptions
—Non-negotiable Instruments.*

Equity—Complaint—Sufficiency—Appeal and Error.

1. Where the sufficiency of the complaint in an equity case was not tested by special demurrer, the only objection made to it being presented on the introduction of evidence, the supreme court on appeal will confine its inquiry to the question whether the pleading states sufficient facts to warrant the relief demanded.

Same—Cancellation of Instruments—Fraud—Complaint.

2. In order to make out a case of fraud, the complaint must allege that the defendant made a representation intending that the plaintiff should act upon it; that the representation was false; that plaintiff believed it, and that he acted upon it to his damage.

Same—Expression of Opinion—Future Events—Complaint.

3. Generally, a mere expression of opinion, however erroneous, a misrepresentation as to what will be done in the future, or a statement of intention, will not warrant cancellation of a contract for fraud.

Same.

4. A misrepresentation with reference to the future, but so related to present conditions that its affirmation will constitute fraud, is sufficient cause for cancellation of the resultant contract.

Same—Complaint—Sufficiency.

5. Whatever is necessarily implied in or is reasonably to be inferred from an allegation is to be taken as directly averred.

Same—Fraud—Complaint.

6. False representation that an investment company would be ready for business within two months, made to induce the sale of stock was a fraud, within the meaning of section 4978, Revised Codes.

Same—Complaint—Remedy at Law—Pleading—Conclusions.

7. An allegation in plaintiff's complaint specifically stating that he had no adequate remedy at law, *held* unnecessary; the question whether the case presented was one of equitable cognizance depending upon the averments upon which demand for relief was predicated, not upon the conclusion of law drawn from them by the pleader.

[As to cancellation of instruments notwithstanding a defense at law, see note in 9 Am. St. Rep. 859.]

Same—Offer to Return Consideration—Complaint.

8. Where the complaint seeking cancellation of a mortgage and notes offered to return the stock in purchase of which they were

given, it was a sufficient allegation of an offer to restore the consideration.

Same—Complaint—Amendment During Trial—Discretion.

9. Where defendants made no showing that they were surprised by an amendment of the complaint made during the course of trial, or were not ready or able to produce all the evidence they desired, they were not in position to allege abuse of discretion on the part of the trial court in permitting the amendment to be made.

Evidence—Letter—Authentication.

10. Where letters offered in evidence were not shown to have been signed by their purported authors or identified as genuine, they were inadmissible for any purpose.

Same—Evidence—Partial Judicial Record from Other States—Inadmissibility.

11. The admission of fragments of a judicial record from another state in evidence, neither disclosing the issues made by the pleadings nor tending to show what was adjudicated by the final judgment, was error.

Same—Pleading and Practice—Reply.

12. The office of a reply is to join issue on or avoid new matter alleged in answer; it cannot aid the complaint by supplying an omission broadening its scope or adding a new ground of relief; hence the admission of evidence in support of such objectionable averments was error.

Same—Findings—Presumptions—Incompetent Evidence.

13. The presumption obtains that the trial court in making its findings in an equity case, after argument by counsel, considered only so much of the evidence as was competent and substantially material, rejecting such as ought to have been rejected.

Same—Non-negotiable Instruments.

14. Where a note and a mortgage securing it were transferred by assignment, the payee indorsing the note without recourse, the transferee took it with full knowledge that it was a mortgage note, collectible under section 6861, Revised Codes,—a non-negotiable instrument subject to all the equities existing in favor of the maker.

Appeal from District Court, Flathead County; T. A. Thompson, Judge.

SUIT to cancel mortgage and notes by A. J. Buhler and another against W. J. Loftus and others. Decree for plaintiffs and defendants Loftus appeal. Affirmed.

Mr. C. W. Pomeroy, for Appellants, submitted a brief and argued the cause orally.

As applicable not only to the question of the insufficiency of the amended complaint but to the case on its merits, it may be stated as a general principle that courts of equity are slow to grant relief in cases of this character. (*Oppenheimer v. Clunie*,

142 Cal. 313, 75 Pac. 899; *Bretthauer v. Foley*, 15 Cal. App. 19, 113 Pac. 356.) Statements made which are mere matters of opinion or relate to what is to happen in the future, even though such statements may turn out to be false, are not sufficient to secure the cancellation of a contract secured by such representations. (8 Thompson on Corporations, sec. 4145; *Henry v. Continental Building & Loan Assn.*, 156 Cal. 667, 105 Pac. 961; *Ott v. Pace*, 43 Mont. 82, 115 Pac. 37; *Butte Hardware Co. v. Knox*, 28 Mont. 111, 72 Pac. 301.)

There is no allegation in the amended complaint of the want of an adequate remedy at law. (16 Cyc. 235; Pomeroy's Equity Jurisprudence, 221, 911, 914, 1377.) Even after the amendment, the amended complaint does not show that the plaintiffs had placed the defendants *in statu quo*. (Sec. 5065, Rev. Codes; *Post v. Liberty*, 45 Mont. 1, 121 Pac. 475; 16 Cyc. 235.)

Plaintiffs by their conduct have precluded their recovery. (2 Pomeroy's Equity Jurisprudence, 749, 817, 897, 917; *Cross v. Mayo*, 167 Cal. 594, 140 Pac. 283; *Oppenheimer v. Clunie*, 142 Cal. 313, 75 Pac. 899.) A subscriber to the capital stock of a corporation whose subscription was induced by fraud was held to have ratified the same after discovering the fraud by giving a proxy and permitting the shares to be voted. (1 Thompson on Corporations, 750.) Plaintiffs having transferred a one-third interest in the loan contract to F. H. McDermott, cannot recover. (6 Cyc. 310, 311.)

Furthermore, courts of equity will not grant relief in cases of this character against a *bona fide* purchaser for value as shown by the following authorities. (2 Pomeroy's Equity Jurisprudence, secs. 785, 786, 871, 918; 6 Cyc. 319.)

The Blue Sky Law: The stock sale in question was the only one proved to have been made or attempted to have been made by either the company or Mr. Loftus. The Act applies only to investment companies and stock brokers. The defendant company was not an investment company as defined by section 1 of the Act. Section 2 defines a stockbroker as one "who shall, in the state of Montana, engage in the business of dealing in

stocks," etc. A single transaction does not constitute "engaging in business." (*Roseberry v. Valley B. & L. Assn.*, 35 Colo. 132, 83 Pac. 637.) Acts of states such as the Blue Sky Law have invariably been held in violation of the commerce clause of and of section 1 of the fourteenth amendment to the federal Constitution. (*William R. Compton Co. v. Allen*, 216 Fed. 537.) The first Michigan Blue Sky Law was held unconstitutional. (*Alabama & N. O. Transp. Co. v. Doyle*, 210 Fed. 173.) In 1915 the legislature of Michigan passed a new law covering the subject, which on the thirtieth day of December, 1915, was held unconstitutional by the federal court. (Not yet reported.)

Messrs. Brennen & Kendall, for Respondents, submitted a brief; *Mr. H. A. Kendall* argued the cause orally.

The evidence shows that the defendants are brothers; that W. J. was indebted to J. H. Loftus, and that J. H. Loftus knew that the consideration of the note and mortgage was the purchase of stock in the company. The court and jury having seen and heard the defendants on the witness-stand, noted their personal appearance and manner of testifying, are the best judges as to whether or not they were telling the whole truth.

Under the law of the state of Illinois, J. H. Loftus took the note and mortgage subject to all of the defenses which could have been raised had they remained the property of the mortgagee, W. J. Loftus, and therefore it was not necessary to show actual notice of the fraud on the part of J. H. Loftus. (27 Cyc. 1324; *Bouton v. Cameron*, 205 Ill. 50, 68 N. E. 800; *Chicago Title etc. Co. v. Aff*, 183 Ill. 91, 55 N. E. 659.) "The mortgage follows the notes only in equity, and is subject in the hands of the assignee to any defense which would avail against it in the hands of the mortgagee himself, although the assignee may have purchased the note in good faith for a valuable consideration and before maturity." (Jones on Mortgages, sec. 838; citing *Olds v. Cummings*, 31 Ill. 188; *White v. Sutherland*, 64 Ill. 181; *Fortier v. Darst*, 31 Ill. 212; *Sumner v. Waugh*, 56 Ill. 531.)

The note in this case was made payable at Dixon, Illinois, and the assignment of the note and mortgage was made in that state. "A mortgage is governed by the law of the jurisdiction in which the mortgaged land is situated; but an assignment of the mortgage is a new and independent contract, and this is governed by the law of the place where it is made." (27 Cyc. 1282.) "An assignment of the mortgage is a new contract and passes a chattel interest, and the rights of the parties are governed by the law of the place where it is executed." (Jones on Mortgages, sec. 823.) We further submit that it was not necessary to show actual notice of fraud on the part of J. H. Loftus by reason of the note and mortgage being non-negotiable, and to sustain this contention the line of reasoning followed in the case of *Cornish v. Woolverton*, 32 Mont. 456, 108 Am. St. Rep. 598, 81 Pac. 4, will apply with equal force to the facts in this case and especially to the construction of section 5031, Revised Codes, providing: "Several contracts relating to the same matters, between the same parties and made as parts of substantially one transaction are to be taken together."

Appellants claim that by reason of plaintiffs having transferred a one-third interest in the loan contract to F. H. McDermont, and that by reason of having, on March 3, 1914, sent their proxy in the name of the president to vote for stock they have precluded their right to relief therein. This question was not raised by a demurrer to the complaint, or in the defendants' answer, or upon the trial of the case, and will be deemed waived. (*Conrow v. Huffine*, 48 Mont. 437, 138 Pac. 1094; 16 Cyc. 176.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The plaintiffs, A. J. and J. M. Buhler, are father and son. On October 14, 1913, the latter executed and delivered to the defendant W. J. Loftus, a resident of Chicago, Illinois, his promissory note, negotiable in form, for the sum of \$2,000, due and payable three years after date with interest at eight per cent

per annum. To secure the payment of the note he executed and delivered to Loftus a mortgage upon certain lands owned by him and situate in Flathead county. The mortgage was duly recorded on October 23. The \$2,000 was the purchase price, agreed to be paid to Loftus by A. J. Buhler, of 100 shares of the capital stock of the American Mortgage Insurance Company, a corporation organized under the laws of the state of South Dakota and having its principal office at Chicago. The purpose of the organization of the corporation was to loan money upon the security of first mortgages on farm lands. It was authorized to do business throughout the United States. Hereafter it will be mentioned as the company. It was capitalized for \$1,000,000, divided into shares of the par value of \$10 each. Loftus was one of the agents of the company to sell shares of its stock and also to appoint local agents to negotiate loans for the company upon a commission. The plan pursued was that anyone desiring or agreeing to become a local agent was required to purchase from the company 125 shares of its stock at \$20 per share. He was then required to enter into a written contract to cover a term of ten years, by the stipulations of which he was appointed the exclusive agent in certain designated territory, in consideration of his performing certain duties for, and assuming certain obligations to, the company. Loftus went to Polson, in Flathead county, the residence of the plaintiffs, to arrange for the appointment of one A. D. Maynard, also a resident of Polson, as local agent. Maynard being away from home, Loftus entered into negotiations with the Buhlers. The negotiations resulted in the purchase by A. J. Buhler of 100 shares from Loftus personally at \$20 per share; the latter agreeing to accept the note and mortgage of J. M. Buhler in place of cash, and giving the assurance that A. J. Buhler would be appointed agent. The action of Loftus was ratified by the company, and the appointment was made on October 20. It was understood at the time that the two Buhlers and F. H. McDermont, an attorney at law then residing at Polson, should each have a one-third interest in the business transacted under the appointment; A. J. Buhler

alone being responsible to the company under his contract. The company was not then ready to begin negotiating loans, but was to begin within two months thereafter. It never did any business, however, for the reason that a sufficient number of shares of stock had not been and could not be sold to realize money enough to enable it to make loans. The note was made payable at the City National Bank at Dixon, Illinois. On January 6, 1914, W. J. Loftus assigned the note and mortgage to defendant John H. Loftus, a brother residing at Dixon, as part payment of a debt due the latter. The assignment was recorded in Flat-head county on May 16, 1914. On May 25, 1915, plaintiffs brought this action to obtain a decree directing a cancellation of the note and mortgage, on the ground of fraudulent representations by Loftus whereby plaintiff J. M. Buhler was induced to execute and deliver them. As ground for relief, the complaint alleges: "(5) That it was represented to plaintiffs, at the time said plaintiff A. J. Buhler entered into said agency contract, by the defendant W. J. Loftus, and the president of the defendant the American Mortgage Insurance Company, H. A. Luther, that the said defendant company, although not fully organized, had not sold all of its capital stock, and was not quite ready to commence business, or to make and accept farm loans in the territory above described, but would be ready for business and accept loans in said territory within about two months from the date of making and entering into said contract, and that the said defendant loan company would allot to plaintiff A. J. Buhler, from month to month, that proportion of its available funds as the number of shares of its capital stock purchased by plaintiff A. J. Buhler bears to the total number of shares of its capital stock then sold for loaning purposes, which would amount to, as a loaning fund, at least \$100,000 annually." It is then alleged in substance: (6) That in order for plaintiff A. J. Buhler to secure the appointment as the sole and exclusive agent of the company, and to secure his approval of the contract, it was represented by Loftus that said Buhler was required to purchase at least 100 shares of the capital stock of the com-

pany at \$20 per share, or a total of \$2,000; (7) that in consideration of A. J. Buhler securing the contract, and that he would be furnished with money for the making of loans in the said territory, Buhler purchased the 100 shares for the sum of \$2,000, and gave in payment therefor his promissory note, payable to the order of Loftus, and that it was signed and indorsed by J. M. Buhler; (8) that thereafter, and on the same day, the plaintiff J. M. Buhler, to secure the payment of the note, and for no other purpose, executed and delivered the mortgage; (9) that thereafter, on or about November 3, 1913, the company issued and delivered to A. J. Buhler the shares of stock, having on October 20 approved the contract and delivered the same to him, thus constituting him its sole and exclusive agent in the said territory; (10) that by reason of the statements and representations before mentioned A. J. Buhler was induced to purchase the shares, to enter into the contract, and to make the promissory note and mortgage and deliver the same to W. J. Loftus; (11) that the representations were wholly false and untrue, that they were then known by the company and Loftus to be false and untrue, that they were made with the intent and purpose of inducing the plaintiff A. J. Buhler to purchase the stock, and to secure from him and J. M. Buhler the note and mortgage, that the company was at all times unable to sell a sufficient amount of stock or otherwise to raise money with which to begin business, or to carry out its contract and agreement with A. J. Buhler, that it has never at any time furnished said Buhler with any money to make farm loans, that the company was insolvent and without funds with which to carry on business, and unable to perform any of the terms of its agreement with A. J. Buhler, and that it was well known to both Loftus and the company, when the note and mortgage were delivered to Loftus, that the company must at an early date go out of business and be dissolved; (12) that the mortgage was recorded in the office of the clerk of Flathead county on the — day of November, 1913; (13) that by reason of the facts heretofore alleged the mortgage and note were given to W. J. Loftus with-

out any consideration, and are wholly null and void, that the company has wholly failed to perform any of the terms of the contract with A. J. Buhler, that the shares of stock are entirely worthless, and that the plaintiffs herein offer to return them to the defendants; (14) that on May 16, 1914, in the state of Illinois, the defendant W. J. Loftus made a pretended assignment of the note and mortgage to his codefendant John H. Loftus, which was thereafter recorded in the office of the clerk of Flathead county; and (15) that John H. Loftus is not a *bona fide* purchaser under the laws of the state of Illinois.

The company, though named as defendant, was not served with summons and did not appear in the action. The answer of the defendants Loftus denies all the allegations of the complaint charging fraud or misrepresentation by W. J. Loftus, and alleges that after the 100 shares of stock were sold to A. J. Buhler he authorized the company to transfer thirty-three shares to F. H. McDermont. In a pleading designated as a reply the plaintiffs allege in effect that the note and mortgage are void for the reason that neither W. J. Loftus nor the company had complied with the laws of Montana (Chapter 85, Laws 1913, p. 367), relating to investment companies and stock brokers, enacted for the protection of investors, *etc.* The court called a jury to aid in ascertaining the facts, and submitted special interrogatories. Some of their findings the court adopted. It made formal findings on all the issues in favor of plaintiffs, and decreed to them the relief demanded. The defendants have appealed.

It would extend this opinion beyond any reasonable limits were we to give special notice to all the assignments made and argued by counsel. Many of them are not of sufficient merit to deserve even passing notice. We shall discuss only those which counsel seem to deem of controlling importance.

We notice, first, the contention that the complaint does not [1] state a cause of action. This question was presented at the opening of the trial by an objection by defendants to the introduction of evidence. Much of the argument on the assignment

is more appropriately addressed to an inquiry whether the pleading is ambiguous and indefinite. Since it was not tested by special demurrer, however much it may be subject to criticism for defects in these particulars, this court is now confined to the single inquiry whether it states sufficient facts to warrant the relief demanded.

It is argued that the representations by which plaintiff A. J. Buhler was induced to enter into the contract of agency were [2, 3] mere matters of opinion or related to what was to happen in the future, and that, though they turned out to be false, they did not constitute fraud, entitling him and his coplaintiff to have the mortgage and note canceled. It is true, as counsel contend, that parties are allowed under the law the greatest freedom of contract; that this is essential to the welfare of the community; that in their negotiations parties must be left to investigate for themselves and rely upon their own judgment; that the power vested in the courts to cancel contracts on the ground of fraud is extraordinary, and will be exercised only in cases in which the complaining party, free from fraud himself, has been deceived to his injury by his adversary; that the ultimate facts constituting the fraud must be specifically alleged, in order that the court may know whether, if proved, they will warrant the relief demanded, and that the adversary may know the particular charge he is to meet; that a misrepresentation as to what will be done in the future, or a statement of intention, or, generally, a mere expression of opinion, however erroneous, is not sufficient; but that the representation must relate to a present or past state of facts. In other words in order to make out a case of fraud, the pleading must allege facts embodying the following essential elements: (1) That the defendant made a representation or statement, intending that plaintiff should act upon it; (2) that the representation was false; (3) that the plaintiff believed it; and (4) that he acted upon it to his damage. (*Butte Hardware Co. v. Knox*, 28 Mont. 111, 72 Pac. 301, and cases cited; *Power & Bro. v. Turner*, 37 Mont. 521, 97 Pac. 950; *Ott v. Pace*, 43 Mont. 82, 115 Pac. 37; *Henry v. Continental B.*

& *L. Assn.*, 156 Cal. 667, 105 Pac. 960; *Crocker v. Manley*, 164 Ill. 282, 56 Am. St. Rep. 196, 45 N. E. 577; *Southern Dev. Co. v. Silva*, 125 U. S. 247, 31 L. Ed. 678, 8 Sup. Ct. Rep. 881; 2 Pomeroy's Equity Jurisprudence, sec. 878.)

The fact concerning which the statement is made, however, [4] may be with reference to the future, but so related to present existent conditions that its affirmation as a fact will constitute a fraudulent representation within the rule of the cases cited. On this subject we find this in the text of Mr. Pomeroy: "That the fact, however, concerning which the statement is made, is future, does not itself prevent the misrepresentation from being fraudulent. The statement of matter in the future, if affirmed as a fact, may amount to a fraudulent misrepresentation, as well as a statement of a fact as existing at present." (2 Pomeroy's Equity Jurisprudence, sec. 877.)

In support of this statement the author cites, among other cases, *Piggott v. Stratton*, 1 De Gex, F. & J. 33, 49, and *Hutton v. Rossiter*, 7 De Gex, M. & G. 9, 22, 23. To these may be added *Pickard v. Sears*, 6 Ad. & E. 469, *Fall River Nat. Bank v. Buffinton*, 97 Mass. 498, and *Chouteau v. Goddin*, 39 Mo. 229, 90 Am. Dec. 462. In the first of these cases Lord Chancellor Campbell said: "I apprehend that the injunction is to be supported on the well-established doctrine that if A makes a deliberate assertion to B, intending it to be acted upon by B, A is estopped from saying it was not true. If it turns out to be false, A is answerable for the damage which may have accrued to B from having acted upon, and B is entitled, in respect of anything done in the belief that it was true, to object to any denial of it by A." In the note to the text of Mr. Pomeroy, *supra*, this remark is made referring to the cases cited: "Some of these cases may be referred to the doctrine of equitable estoppel; but it is plain that, where the representation is that of a fact in the future, and not a mere promise, and it is relied upon, and turns out to be false, the rights and remedies of the injured party are the same as those which arise from the fraudulent representation of an existing fact." Under this rule, the representation,

we apprehend, will operate as an estoppel in favor of the injured party, or may be availed of by him as a ground for the cancellation of a contract entered into upon the faith of it, according to the attitude occupied by the parties in the particular controversy, and the character of the relief sought.

The complaint is not a model of clearness and orderly statement; but, assigning to the several parts of it their obvious meaning and purport, and construing it as a whole under favor of the familiar rule that "whatever is necessarily implied in, or [5] is reasonably to be inferred from, an allegation, is to be taken as directly averred" (Phillips on Code Pleading, 352; Bayliss on Code Pleading, 49; *County of Silver Bow v. Davies*, 40 Mont. 418, 107 Pac. 81), we think it alleges sufficient to bring it within the rule stated by Mr. Pomeroy, *supra*.

The purpose of the negotiations had between the parties was [6] that A. J. Buhler should become the exclusive agent for the company in the territory mentioned. The representation which operated as the inducement is alleged in paragraph 5. It is in effect a categorical statement that, while the company was not then ready to begin business, it was in such a condition that it would be ready in about two months and prepared to furnish the funds required to enable A. J. Buhler to negotiate loans in its behalf. In paragraphs 6, 7 and 8 is alleged the consideration demanded by Loftus for the contract, the purchase of the shares of stock which was made a condition precedent to the appointment, and the execution of the note and mortgage to secure the consideration to be paid, instead of paying it in cash. Paragraph 9 recites the approval of the negotiations by the company, the issuance of the shares of stock, and the final appointment for which the consideration was promised. Paragraph 10 alleges in effect that, by reason of his belief in and reliance upon the alleged statements of Loftus and Luther, the president, A. J. Buhler was induced to purchase the shares and to enter into the contract of appointment for the consideration demanded. Paragraph 11 alleges that the representations stated in paragraph 5 were wholly false, that they were known by Loftus and

the president of the company to be such, that they were made with the intention to deceive and defraud the plaintiffs and to induce the execution of the note and mortgage, and that the company was unable at any time to sell its stock or to raise money otherwise to make loans or to furnish A. J. Buhler money for that purpose, in that it was insolvent at the time the contract was made.

If the representation had been in the form of a promise merely that the company would furnish A. J. Buhler money within two months of the date of appointment, it being able at the time and intending to do so, its failure to keep the promise would have been a breach of the contract. The plaintiffs, however, understood—and it was the intention of Loftus that they should understand—that the company had then approached a condition of readiness such as to enable it within two months to engage in the business which it was organized to conduct. This was tantamount to an affirmation of a matter in the future as a fact existing at the time the contract was made, and was the inducement upon which he effected the sale of the stock and the execution and delivery of the note and mortgage. It amounted to the suggestion as a fact of that which was not true, by Loftus, who did not believe it to be true, and was therefore a fraud, within the meaning of subdivision 1 of section 4978 of the Revised Codes. In any event, his statements amounted to an “act fitted to deceive.” (*Id.*, subd. 5.)

It is argued that the complaint is insufficient, also, in failing [7] to allege in specific terms that plaintiffs are without an adequate remedy at law. Whether the particular case alleged is one of equitable cognizance depends solely upon the specific averments upon which the demand for relief is predicated. The addition of the jurisdictional clause does not aid it in any way. It is merely a conclusion of law to be drawn by the court, not by the pleader, from the specific facts alleged. The allegation of it is therefore wholly unnecessary. (16 Cyc. 222.)

It is also argued that it does not appear that the plaintiffs [8] have offered to restore to the defendants the shares of

stock. This argument is without merit. The concluding clause of paragraph 13 is sufficient allegation on this subject. (*Maloy v. Berkin*, 11 Mont. 138, 27 Pac. 442.)

During the course of the trial the court permitted certain [9] amendments to be made to the complaint. It is argued that this was error, in that the effect of the amendments was to make the complaint state a cause of action; whereas, before they were allowed, it was fatally defective. There was no error. The power to allow the amendments at any stage of the trial is within the discretion of the trial court, and its action in this behalf is not subject to review by this court, unless it is affirmatively shown that it abused its discretion to the prejudice of the adverse party. (Rev. Codes, sec. 6589; *Bennett v. Tillmon*, 18 Mont. 28, 44 Pac. 80; *Merrill v. Miller*, 28 Mont. 134, 72 Pac. 423; *Sandeen v. Russell Lumber Co.*, 45 Mont. 273, 122 Pac. 913; *De Celles v. Casey*, 48 Mont. 568, 572, 139 Pac. 586.) Though the defendants demanded a postponement of the trial, because of the allowance of one of the amendments, they presented no affidavit showing that they were surprised, or that they were not ready and able to produce all the evidence they desired. Indeed, it is apparent that they introduced all the evidence they had at their command.

Error is predicated upon the admission in evidence of Exhibits [10] "D" and "F." The first was a letter addressed to the stockholders, ostensibly by H. A. Luther, president of the company, under date of April 21, 1914, conveying the information that at the annual meeting of stockholders held in Chicago on April 7, 1914, it had been determined to surrender the Chicago office and remove general headquarters of the company to Aberdeen, South Dakota; that a committee had been appointed, whose chairman was W. S. Narregang, of the latter place, himself a stockholder, to suggest a feasible plan to conduct the business of the company; and that all letters addressed to the company should be addressed to Narregang until May 23, to which date the meeting of April 7 had been adjourned to reconvene at Aberdeen. It contained what purported to be resolutions adopted

at the April meeting. Exhibit "F" was a letter written to A. J. Buhler by Narregang on August 13, 1914, stating in effect that the company was going out of business, and was not in a position to make any loans of any kind. These were introduced, as tending to show that the company was in a failing condition, and hence that the representations of Loftus were false. They were not shown by any evidence to have been in fact signed by their purported authors, or identified as genuine. They were, therefore, not admissible for any purpose.

Like objection was made to the introduction of Exhibits "H" and "I." The first consisted of an order by the circuit court [11] of the fifth judicial district of South Dakota, made on May 13, 1914, appointing one Arthur M. Cole temporary receiver to take charge of the property and assets of the company, in an action entitled *S. W. Narregang v. American Mortgage Insurance Company*. The second was a copy of the register of actions in the cause, disclosing the different proceedings had in it until it ended. Both were exemplified as required by section 7911 of the Revised Codes. They were introduced to show that the company had been forced into the hands of a receiver as an insolvent, and that it had thereafter been dissolved. Both these exhibits were mere fragments of the record, and did not tend to show for what cause the receiver was appointed, nor what was adjudicated by the final judgment. They were not, therefore, competent for any purpose. The order was interlocutory, and did not adjudicate anything. The register of actions merely indicated that certain steps had been taken in the action. Assuming that the final judgment in the action would have been admissible for the purpose intended (the company was not made a party to the present action), it could be made available only by the production of an exemplified copy of the entire record, or so much of it as would disclose the issues made by the pleadings and what was finally adjudicated in the action.

In support of the allegations in their reply, the plaintiffs [12] were permitted to introduce the deposition of Honorable William Keating, the state auditor and investment commissioner

of Montana, to show that neither W. J. Loftus nor the company had been licensed to transact business of any kind in Montana. It is not necessary to inquire whether the sale of the shares of stock to plaintiffs was a doing business in the state, within the meaning of the statute relating to investment companies, *supra*, sought to be invoked by plaintiffs, or whether, if the sale of the shares was void, the plaintiffs were entitled for this reason to have the note and mortgage canceled. The allegation of new matter in the reply to impeach the sale transaction constituted a distinct departure in the pleadings, and presented an issue upon which no relief could be predicated. The office of a reply is to join issue upon the counterclaim, or the new matter of defense alleged in the answer, or to avoid it, as the case may be. It may, in a particular instance, aid the answer; but it cannot aid the complaint, by supplying an omission therein or broadening its scope, by adding to it a new ground of relief. (*Thornton v. Kaufman*, 35 Mont. 181, 88 Pac. 796; *Waite v. Shoemaker*, 50 Mont. 264, 146 Pac. 736; *Doornbos v. Thomas*, 50 Mont. 370, 147 Pac. 277; Bliss on Code Pleading, 437; 9 Cyc. 747.) The objection to these items of evidence should have been sustained.

Other rulings upon the admissibility of evidence are also assigned as error. None of these require special notice, save those which had reference to the means of proof of the unwritten law of the state of Illinois relating to the nature of the right acquired by the assignee of a trust deed or mortgage and the note secured by it. We shall notice these later when we come to inquire whether John H. Loftus became the owner of the note and mortgage free from equities in favor of plaintiffs.

Counsel strenuously insist that the rulings just noticed entitle [13] defendants to a reversal of the decree. If the court had adopted the findings of the jury without further consideration, and rendered its decree thereon, the argument of counsel would perhaps have some plausibility. (*Wetzstein v. Largey*, 27 Mont. 212, 70 Pac. 717.) This, however, the court did not do. The formal findings were made after careful consideration of the

evidence by the court, and after argument by counsel for defendants on their motion asking the court to reject the findings of the jury and adopt findings in favor of defendants. Under the circumstances, we may presume that the trial judge based the findings upon so much of the evidence as was competent and substantially material, rejecting such as ought to have been rejected. (*Finlen v. Heinze*, 28 Mont. 548, 73 Pac. 123; *Lane v. Bailey*, 29 Mont. 548, 75 Pac. 191; *State v. Driscoll*, 49 Mont. 558, 144 Pac. 153.)

The next assignment we will consider is that the evidence is insufficient to justify the findings. Since the appeal is from the judgment only upon a bill of exceptions, the question presented by the assignment is, not whether the trial court abused its discretion in denying defendants a new trial, but whether there is any substantial evidence to support the findings as made. We shall not undertake to state and discuss the evidence with reference to the different findings in detail. It is sufficient to say that, with the exception of the finding of the specific date at which the receiver was appointed, and the finding that neither W. J. Loftus nor the company had been licensed to do business in Montana, to which reference will be made later, the findings are responsive to the general scope and meaning of the allegations of the complaint, and are supported by substantial evidence. It is true that it is alleged in the complaint that the note was that of A. J. Buhler, and that it was signed and indorsed by J. M. Buhler, and that the evidence shows that it was signed by J. M. Buhler only, and not indorsed by him. This is not a material variance, as counsel contend. The note and mortgage were given by J. M. Buhler to secure the appointment of A. J. Buhler as the exclusive agent of the company, and to enable the latter, as between the two, to have an interest in the commissions earned in the business. It appears incidentally, also, that it was the intention of A. J. Buhler that one-third of the shares of stock, when issued, should belong to F. H. McDermont, one of counsel for plaintiffs, who, as between him and the Buhlers, was to have a one-third interest in the commissions

earned in the business. It is insisted, therefore, that it appears that McDermont owns an interest in the stock, and hence that this condition of the evidence constitutes a material variance. The certificates themselves, however—one for sixty-seven shares and the other for thirty-three shares—were at the time of the trial still owned by A. J. Buhler, and were then tendered by him to the defendants. There was, therefore, no variance in this regard. The fact that the plaintiffs and McDermont had an agreement among themselves to share in the commissions to be earned is not of consequence.

It is insisted that there is no evidence tending to show that the stock is of no value. While, as we have said, the evidence introduced by plaintiffs, heretofore referred to as tending to establish the fact that the company was insolvent and that the stock was worthless, was incompetent, the defendant W. J. Loftus during the giving of his testimony admitted, in effect, that when the contract with A. J. Buhler was made, and he secured the note and mortgage, the company was in a condition of insolvency. According to his testimony, the company was organized and commenced selling stock in the spring of 1912. Though at the time the contract was made it had been engaged for more than a year in the attempt to accumulate sufficient cash from stock subscriptions to begin business, and had nominal assets to the amount of \$175,000, it had accumulated but a small amount of cash; the great bulk of its assets consisting of subscription notes payable on the condition that all the stock had been subscribed for. The officers of the company were making every effort to get the stock disposed of, but had failed to do so, and he attributed this condition to a stringency in the money market. He admitted, however, that the company had gone into the hands of a receiver in May, 1914, at the suit of Narregang, one of the largest creditors. Taking the testimony as a whole, it furnishes some basis for the inference that the stock was not worth \$20 per share, nor any other amount. Aside from this, however, the main purpose of the transaction was to secure for A. J. Buhler the appointment as exclusive agent of the company

upon the implied assurance that it was practically ready to begin business. The purchase by him of the stock was not as an investment, but to qualify himself to secure the appointment, so that he would thereafter have a profitable business; and it is clear from all the evidence that, but for the assurance of the appointment, he would not have bought the stock. True, he was awarded the appointment; but it was without value, and the purpose he had in view failed of accomplishment entirely. In fact, the net result was that he did not get what he contracted for, and that W. J. Loftus secured a sale of stock owned by him personally at double its nominal value; whereas, when questioned as to its actual value, he was not willing to go further than to say that it had a value of about \$16, basing this opinion upon his estimate of outstanding conditional subscription notes. On the whole, we think that the evidence, direct and circumstantial, is sufficient to justify the findings, so far as they are material and responsive to the allegations of the complaint. In view of this conclusion, the finding touching the matter of failure by Loftus and the company to obtain license under the statute, *supra*, may be eliminated and disregarded as immaterial. The same disposition may be made of the criticism of the finding as to the exact date when the receiver of the company was appointed.

It remains to inquire whether John H. Loftus took the note and mortgage free from all equities in favor of J. M. Buhler. [14] Since the assignment was made in Illinois, counsel for the plaintiffs assumed that the assignee's rights were to be determined by the unwritten law of that state, and offered evidence to prove it. The mode adopted was this: Mr. Kendall, one of counsel for plaintiffs, testified in effect that he had become acquainted with the decisions of the supreme court of Illinois by reading the opinion in the case of *Bouton v. Cameron*, as published in 205 Ill. 50, 68 N. E. 800, and other cases. Thereupon the opinion was admitted over the objection, among others, that Mr. Kendall had not disclosed sufficient knowledge to lay the foundation for its admission. The means by which such

proof may be made are prescribed by section 7908 of the Revised Codes. (See, also, *Ridpath v. Heller*, 46 Mont. 586, 129 Pac. 1054.) We shall not stop to determine whether the evidence was properly admitted. Assuming that the law of the state of Illinois is as counsel undertook to show, the law on the subject in this state is the same, and the conclusion reached by the trial court would have been the same, though the evidence had been rejected. The note did not refer to the mortgage and upon its face was negotiable. If it had been transferred to John H. Loftus by indorsement, without mention of the mortgage, what rights he would have acquired would have depended upon the solution of a different question from that before us, *viz.*, whether, in view of the restrictive provision found in section 6861 of the Revised Codes, he would have acquired the rights of a holder in due course under the Negotiable Instrument Law (Rev. Codes, sec. 5906). The transfer, however, was made by written assignment of the note and mortgage both; W. J. Loftus indorsing the note without recourse. John H. Loftus, therefore, took it with full knowledge that it was a mortgage note, collectible by him only as such, under the provisions of section 6861, *supra*. It therefore did not come into his hands as "a courier without luggage," but as a non-negotiable instrument, subject to all the equities existing in favor of J. M. Buhler at the time he received it. This was expressly so held by this court in *Cornish v. Woolverton*, 32 Mont. 456, 108 Am. St. Rep. 598, 81 Pac. 4, and that case is conclusive of this. Though the recorded written assignment gave J. M. Buhler constructive notice that John H. Loftus had become the owner of the note, it did not serve in any wise to cut off Buhler's right to impeach the note on the ground that it had been secured by fraud.

The judgment is affirmed.

Affirmed.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

STATE, RESPONDENT, v. WOOD, APPELLANT.

(No. 3,964.)

(Submitted April 24, 1917. Decided May 26, 1917.)

[165 Pac. 592.]

*Osteopathy — Practicing Without License — Information—Sufficiency—Negating Exceptions.***Criminal Law—Indictment and Information—Negating Exceptions.**

1. Unless an exception found in a statute is a part of the definition of the offense sought to be described, the state is not required to negative such exception in an indictment or information.

Osteopathy—Practicing Without License—Negating Exception.

2. *Held*, that the proviso in section 1605, subdivision b, Revised Codes, that nothing in the section (defining the practice of osteopathy) shall be construed to restrain or restrict a legally licensed physician or surgeon in the practice of his profession, is not an exception within the meaning of paragraph 1, *supra*, since neither physician nor surgeon can practice osteopathy without first obtaining a license from the board of osteopathic examiners.

[As to statutes regulating the practice of physicians and surgeons and to whom they apply, see note in 98 Am. St. Rep. 742.]

Same—Temporary Certificate—Information—Sufficiency.

3. *Held*, further, that the provision of section 1597, Revised Codes, that the secretary of the board of osteopathic examiners may, upon examination, grant a certificate to practice osteopathy until the next meeting of said board, when the temporary certificate shall expire, is not an exception, but a matter of defense, hence the state was not required to negative defendant's possession of a temporary certificate.

Appeal from District Court, Fergus County; Roy E. Ayers, Judge.

B. J. WOOD was convicted of practicing osteopathy without a license, and, from the judgment and from an order denying his motion for new trial, he appeals. Affirmed.

Mr. C. J. Marshall, Mr. W. H. Smith and Messrs. Morris & Hartwell, the latter of the Bar of La Crosse, Wisconsin, for Appellant, submitted a brief.

This indictment charges the defendant with the practice of osteopathy "without first having obtained a certificate or license, etc. * * * and he, the said B. J. Wood, not being then and

there a practitioner of medicine and surgery." Section 1601, Revised Codes, prohibits the practice without a license or certificate issued after certain examinations. This is covered in the indictment. In section 1604b regularly licensed physicians are exempted. Section 1597 provides for the issuance of a temporary certificate by the secretary of the board. This is not negatived in the indictment. Appellant respectfully urges that the negating of the provision in section 1604b was unnecessary, as the offense is completely charged without mentioning it. It is a matter of defense. Also that having assumed the burden of mentioning and negating any unnecessary provision of the law, the state thereby assumes the duty of negating all of the exceptions. This it has not done, failing to mention the class of persons set forth in section 1597. So the indictment must fall. (*State v. Huxoll*, 191 Mo. 304, 178 S. W. 866; 22 Cyc. 347; *State v. Pittman*, 10 Kan. 593; *State v. Pitzer*, 23 Kan. 250; *State v. Sommers*, 3 Vt. 156; *Herring v. State*, 114 Ga. 96, 39 S. E. 866; *Gee Wo v. State*, 36 Neb. 241, 54 N. W. 513.) Defendant's motion to quash the indictment should have been granted.

It is elementary that the state must prove all of the material allegations of the indictment. Having assumed the burden of showing that the defendant had no legal right to practice, the state should have shown every element, including the fact that defendant had no temporary certificate, which appellant urges is not issued after an examination and not issued by the board, but by its secretary.

Mr. S. C. Ford, Attorney General, *Mr. Frank Woody*, Assistant Attorney General, and *Mr. J. P. Donnelly*, for Respondent, submitted a brief; *Mr. Donnelly* argued the cause orally.

It is elementary that if the indictment charged an offense without negating the fact that the appellant had a temporary certificate, then such fact, if true, was a matter of defense, and need not be proved by the state. Therefore the only question so far as this feature of the case is concerned is: Should the exception provided for by section 1597, Revised Codes, relating

to temporary certificates, be negatived in the indictment? The rule as to when an exception or proviso should be pleaded in an indictment or information has been variously stated by the authorities. The great weight of authority, however, and the rule adopted by this court is that it makes no difference in what part of the Act the exception is found, the criterion which will determine the necessity of its negation, is this: Is the exception or proviso an ingredient or constituent part of the definition of the offense? If it is, the exception should be negatived in the pleading; if not, it is a matter of defense. (*State v. Williams*, 9 Mont. 179, 23 Pac. 335, *Territory v. Burns*, 6 Mont. 72, 9 Pac. 432; *State v. Abbey*, 29 Vt. 60, 67 Am. Dec. 754; *Jenkins v. State*, 36 Tex. 638; *State v. Rupe*, 41 Tex. 33; *Territory v. Scott*, 2 Dak. 212, 6 N. W. 435; *Ferner v. State*, 151 Ind. 247, 51 N. E. 360; *Hale v. State*, 58 Ohio St. 676, 51 N. E. 154; *People v. Boo Doo Hong*, 122 Cal. 606, 55 Pac. 402; *State v. Miller*, 24 Conn. 522; *United States v. Cook*, 17 Wall. (U. S.) 173, 21 L. Ed. 538; *Nelson v. United States*, 30 Fed. 112.)

It is manifest that the exception in the present case constitutes no part of the definition of the offense; that it affords a matter of excuse merely, and should be relied upon in defense.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

B. J. Wood was convicted of practicing osteopathy without a license, and has appealed from the judgment and from an order denying his motion for a new trial.

The three specifications of error raise but a single question, viz.: Was it necessary for the state to plead and prove that, at the time the alleged offense was committed, the defendant did not have a certificate issued by the secretary of the board of osteopathic examiners authorizing him to practice osteopathy until the next meeting of the board? If it was necessary to allege the fact, it was necessary to prove it, and, conversely, if it was not necessary to allege it, it was not necessary to offer any proof

concerning it. The fact is not alleged, and the state did not offer any evidence upon the subject; hence these appeals.

The practice of osteopathy is regulated by sections 1594–1606, [1–3] Revised Codes. A state board of osteopathic examiners is created and its duties defined. Every person who practices osteopathy in this state is required to secure from such board a license authorizing him to do so. Section 1596 provides: “It shall be unlawful for any person to practice osteopathy in this state without a license from said board.” And section 1601 prescribes the penalty for a violation of the statute. Section 1605 defines the practice of osteopathy, and subdivision “b” concludes as follows: “Provided, however, that nothing in this section shall be construed to restrain or restrict any legally licensed physician or surgeon in the practice of his profession.” Section 1597 provides: “The secretary of the board of osteopathic examiners may upon examination, grant a certificate to an applicant to practice osteopathy until the next meeting of said board when he shall report the facts, at which time the temporary certificate shall expire,” *etc.*

The indictment upon which defendant was tried charges him with practicing osteopathy for compensation “without first having obtained a certificate or license from the state board of osteopathic examiners of the state of Montana entitling him so to do,” and the charging part of the indictment concludes: “He, the said B. J. Wood, not being then and there a practitioner of medicine and surgery regularly and duly licensed to practice under the laws of the state of Montana.” It is the contention of appellant that the provision of section 1597 relating to one who has a temporary certificate to practice osteopathy, and the provision of section 1605b relating to licensed physicians and surgeons, each constitutes an exception to the statute which defines the offense of practicing osteopathy without a license, and, since the state negatived one of these exceptions, it was incumbent upon it to negative the other, and, having failed to do so, the indictment does not state a public offense and will not support a judgment of conviction; and, since the state did not

prove that defendant did not have such temporary certificate, the evidence is insufficient to sustain the verdict.

We are not prepared at this time to accept the rule announced by the Kansas City court of appeals, in *State v. Huxoll*, 191 Mo. App. 304, 178 S. W. 866, as applied to the facts of that case; but assuming, for the purposes of these appeals only, that the rule correctly states the law, and that, "where an indictment is unnecessarily particular in its negatives the state is concluded by it if it fails to specifically negative all the exceptions," we are confronted in this instance with the inquiry: Does this case fall within the rule? Does this indictment negative one exception found in the statute, and fail to negative another one found therein?

"An exception takes out of an engagement or enactment something that would otherwise be part of the subject matter of it." (Bouvier's Law Dictionary.) If the concluding portion of subdivision "b," section 1605, quoted above, is an exception, then a physician or surgeon is not within the prohibition of the penal statute, and may lawfully practice osteopathy as such in this state without a license from the state board of osteopathic examiners. That this was not the intention of the lawmakers is practically a demonstrable fact. The practice of medicine and surgery is regulated by sections 1585-1593, Revised Codes. *Every person* who practices medicine or surgery is required to secure a certificate from the state board of medical examiners, and every person who violates the statute is guilty of a misdemeanor. Section 1590 excepts from the provisions of the statute skilled and experienced midwives, commissioned surgeons of the army and navy in the discharge of their official duties, and physicians or surgeons, from other jurisdictions, in actual consultation here. Section 1591 defines "practicing medicine or surgery," and then proceeds: "Provided however, that nothing in this section shall be construed to restrain or restrict any legally licensed osteopathic practitioner practicing under the laws of this state." A physician or surgeon, within the meaning of these statutes, is one who has received from the state

board of medical examiners a certificate authorizing him to practice medicine and surgery. An osteopathic practitioner is one who has received from the state board of osteopathic examiners a license authorizing him to practice osteopathy.

In *State v. Dodd*, 51 Mont. 100, 149 Pac. 481, we considered these statutes at length and concluded that the practice of medicine and surgery does not include the practice of osteopathy, and that the practice of osteopathy does not include the practice of medicine and surgery; that the legislature has grouped all persons practicing the healing art into two distinct classes, (1) physicians and surgeons, and (2) osteopathic practitioners, and that the so-called proviso added to section 1591 above "did not affect the status of osteopathic practitioners in the least. They were confined thereafter, as theretofore, to the practice of osteopathy and forbidden to practice medicine or surgery without the certificate from the state board of medical examiners required of everyone who seeks to engage in such practice." We are more than ever confirmed in the correctness of those conclusions. The so-called proviso found in section 1591, and the like provision in section 1605b, were doubtless enacted out of abundance of caution and to emphasize the legislative intention that neither school of practice should be held to infringe upon the other.

Having determined that the provision in section 1591 does not permit an osteopathic practitioner to practice medicine or surgery without a certificate from the state board of medical examiners, it follows that the compensating provision in section 1605b does not permit a physician or surgeon to practice osteopathy without a license from the state board of osteopathic examiners, and, since the provision in section 1605b does not exempt physicians or surgeons from the operation of the statute prohibiting the practice of osteopathy without the required license, it is not an exception within the meaning of that term as applied to statutory construction. It follows that the indictment under review does not negative any exception, and that the rule invoked by appellant has no application here.

Assuming that the provisions of section 1597 constitute an exception, was it necessary for the state to negative that exception by pleading and proving that this defendant did not have a temporary certificate from the secretary of the state board of osteopathic examiners authorizing him to practice osteopathy until the next meeting of the board? In *Territory v. Burns*, 6 Mont. 72, 9 Pac. 432, this court announced the rule as follows: "The criterion which determines the necessity to negative such exception is that it be a constituent or ingredient of the offense. In other words, that such exception is necessary to its complete definition. When the exception is not a part of the definition of the offense, and in this way does not, therefore, become a part of the enacting clause, it is a matter of defense." The rule has since been approved in *State v. Williams*, 9 Mont. 179, 23 Pac. 335, and in *State v. Tully*, 31 Mont. 365, 3 Ann. Cas. 824, 78 Pac. 760, and is approved by the authorities generally. (*Ferner v. Slate*, 151 Ind. 247, 51 N. E. 360; *Hale v. State*, 58 Ohio St. 676, 51 N. E. 154; *Smith v. People*, 51 Colo. 270, 36 L. R. A. (n. s.) 158, 117 Pac. 612.) A further citation of the authorities will be found in the note to *Devine v. Commonwealth*, 13 Ann. Cas. 364; in 14 R. C. L. 188; and in 22 Cyc. 344.

The completed offense of practicing osteopathy without a license is clearly defined in the statute without reference to the provisions of section 1597. The exception is not any part of the definition of the offense, and it was therefore not necessary to negative it. If the defendant had such temporary certificate, it was a matter of defense.

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

STATE, RESPONDENT, v. STORY, APPELLANT.

(No. 3,969.)

(Submitted April 23, 1917. Decided May 28, 1917.)

[165 Pac. 748.]

*County Commissioners—Removal—Collection of "Illegal Fees"
—Compensation—Statutes.***Removal of Officers—"Illegal Fees"—Definition.**

1. *Held*, that "illegal fees," for the collection of which a public officer may be removed under section 9006, Revised Codes, are any moneys collected or attempted to be collected by a public officer from any source whatever, whether as mileage, *per diem*, or specific charge for service rendered in his office, without authority of law for such collection, though done in good faith and for efficient service performed for the public.

[As to public officer "knowingly" taking illegal fees, see note in *Ann. Cas.* 1912A, 433.]

Same—County Commissioners—Compensation—Statutes.

2. *Held*, further, that the effect of sections 3194 and 2952, Revised Codes, is not to authorize compensation to county commissioners, for attending to business of the county other than meetings of the board, and inspecting and overseeing roadwork, without a previous order of the board, charges for which services are otherwise illegal.

'Appeal from District Court, Gallatin County, in the Ninth Judicial District; R. Lee Word, a Judge of the First District presiding.

PROCEEDINGS by the State, on the accusation of M. Langohr and others, against Nelson Story, Jr. From an adverse judgment, defendant appeals. Affirmed.

Mr. W. S. Hartman and *Mr. Justin M. Smith*, for Appellant, submitted a brief; *Mr. Hartman* argued the cause orally.

Mr. S. C. Ford, Attorney General, and *Mr. Frank Woody*, Assistant Attorney General, for the State, submitted a brief; *Mr. Woody* argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

In a proceeding had under the provisions of section 9006, Revised Codes, the appellant, Nelson Story, Jr., was found by

the district court of Gallatin county to have charged and collected illegal fees for services rendered in his office as county commissioner of said county, and was adjudged to be deprived of and ousted from such office. The basis for the finding and adjudication is an agreed statement of facts from which it is made to appear, among other things: That the appellant charged and collected from the county certain bills for services as county commissioner, which bills included items of charge at the rate of \$8 per day for "attending to business of the county" other than meetings of the board, and items of charge at the rate of \$8 per day for "inspecting and overseeing roadwork"; that the service for which such charges were made was actually rendered and believed to be for the best interests of the county in connection with roadwork under the immediate supervision of the board, but was not rendered pursuant to any previous order of the board directing the appellant to inspect the condition of any contract construction work on any highway or bridge in the county, or in connection with any such inspection.

I. The main contention of appellant is stated in the language of his counsel as follows: "We contend that the word 'fees,' as used in the section under consideration, refers only to the statutory charges for official services rendered by an official to the different members of the general public, and does not in any way include, refer to, or contemplate the compensation, whether by way of salary or *per diem*, paid by the state or the county direct to its officials for services rendered; that the statute was intended for the protection of the individual members of the general public who, dealing with the officer, as such, may have been compelled to pay an illegal fee for the services rendered; that it was never intended to protect the county, the state, or the municipality from charges by the officer against it for services rendered by the official which were either illegal or wrongful or which were covered by his compensation or salary fixed by the statute regulating the compensation which he should receive for his services; that the statute is both penal and criminal, and that it cannot be extended to charges made by officials (however

irregular, wrongful or illegal) for services performed or alleged to have been performed which were not within the purview of the statute when enacted; that in this state county commissioners do not, and never have, charged, collected or received 'fees' within the meaning of the statute; that they could not do so from the nature of the services required of them by the statute, and rendered by them in practice; that, conceding that appellants charged and collected *per diem* for services which they had rendered to the county, which charges and collections were without authority of law, they did not thereby become guilty of charging and collecting illegal fees within the purview of the statute in question; and that therefore the judgment of ouster rendered against them in their respective cases by the trial court should be reversed."

This entire contention is in reality foreclosed by the decision of this court in *State ex rel. Payne v. District Court, ante*, p. 350, 165 Pac. 294, wherein we said: "The term 'fees,' used in the Codes, is somewhat elastic. Section 3172, Revised Codes, provides that 'the county surveyor is entitled to receive and collect for his own use the following fees: * * * Expense of chainman and markers,' etc. Section 3173: 'The coroner is entitled to receive and collect for his own use the following fees: * * * For each mile actually traveled in the performance of any duty, ten cents.' We think the term 'fees,' used in section 9006, is sufficiently broad to comprehend both *per diem* and expenses. * * * If the items for which the accused charged these fees show on the face of them that they are not authorized by law, there is no necessity to characterize them or to attempt to show wherein they are illegal. They show for themselves. We think the accusation, in the first count, is sufficient to charge the collection of illegal fees. In effect, it alleges that the accused, acting in his official capacity as county commissioner of Madison county, spent one day seeing about a right of way for which he charged and collected from the county \$8, and \$5 additional for expenses, etc. This item particularly is not comprehended within any provisions of law authorizing fees or other compensation to a member

of the board of county commissioners for services rendered in his office, and is therefore *prima facie* illegal." Because, however, the conclusion thus announced has been challenged by a motion for rehearing, and because the appellant here invokes historical data to support his view, we determined to re-examine the subject. The result has been to confirm our view that the term [1] "illegal fees" is used in section 9006 in its broadest sense, as meaning any moneys collected or attempted to be collected, by a public officer from any source whatever, whether in the guise of mileage, *per diem* or specific charge for service rendered, or to be rendered, in his office without authority of law for such collection. We are impelled to this result by these considerations:

1. Neither in common parlance nor in legal usage has the word "fees" any such narrow limit as that assigned to it by appellant's counsel. It has many meanings, general and particular. Generally it signifies a reward or payment of money (Trench's Select Glossary); money paid or bestowed; emolument (Century Dictionary); reward or compensation for services rendered or to be rendered (Webster's International Dictionary). In its particular sense it imports a recompense or reward fixed by law for the services of a public officer. (Century Dictionary.) Legally, it means a reward or wages given to one for the execution of his office, differing from costs in that fees are a recompense to the officer for his services. (Bouvier's Law Dictionary.) Nowhere is it said to connote a particular source, as from individuals, and not from nation, state or county. So that, considered in its ordinary significance, the term "fees," as used in section 9006, would cover the appellant's charges made upon and paid by the county, and the phrase "collecting illegal fees for service rendered" accurately describes his receipt of the money if there was no legal warrant for its payment.

2. Confining ourselves to the historical data submitted, we might possibly conclude that prior to 1895 the word "fees" was understood as counsel now defines it, but a wider survey convinces us that this would not be correct. In the Bannack Stat-

utes (page 470 *et seq.*) it is specifically applied to the sheriff's *per diem* for attending court, payable by the county, to his compensation for dieting prisoners, to his mileage for serving papers and for transporting prisoners; also to the compensation of \$10 for each inquest and to the mileage allowed coroners, payable by the county; also to the *per diem* of judges and clerks of election, payable by the county; also to the compensation, percentages, and mileage allowed the county treasurer, payable by the county; also to the *per diem* and mileage of election couriers, the *per diem* and mileage of witnesses, the *per diem* and mileage of jurors, and the *per diem* of prosecuting attorneys attending causes on change of venue. Substantially the same use of the word appears in the Codified Statutes of 1871-72 (page 420 *et seq.*), in the Revised Statutes of 1879 (5th Div., secs. 585, 586, 587, 590, 593, 594, 596), and in the Compiled Statutes of 1887 (5th Div., secs. 956, 1074, 1075, 1089, 1090, 1095). It is further interesting to note that in the "Act concerning compensation of county, district, and township officers," approved March 6, 1891 (Sess. Laws 1891, p. 235 *et seq.*), the word "fees" is used to describe charges paid by the county as well as by individuals, and charges for *per diem* and mileage as well as those for specific service; moreover, section 9 of the Act contains a provision that "any such officer who shall receive any fee or reward or salary not specifically provided by law shall be liable to the county, state, or persons paying the same," *etc.* While none of these references apply specifically to county commissioners, they establish, we think, that prior to 1895 the word "fees" meant more than specific charges to individuals for particular services, and that illegal fees could be collected from the county and could consist of unauthorized claims for *per diem* and mileage.

But, whatever may be the correct, or even just, inference from previous legislation, there cannot be the slightest doubt that, when the Codes of 1895 were enacted, including as section 1545 of the Penal Code the present section 9006 of the Revised Codes, the term "fees" was not confined in its significance to specific charges for particular services rendered to individuals,

nor did it always exclude moneys had from the county or state, whether as compensation, *per diem*, or mileage. On the contrary, we find in the Chapter on "Salaries and Fees of Officers" (Chap. IV, Pt. IV, Tit. II, Pol. Code), which with few changes reappears in the Revised Codes of 1907 as sections 3111-3197, that it is used in almost every possible sense. For example: In section 4592 (Rev. Codes, sec. 3113) it means a mode of compensation different from salary; in section 4604 (Rev. Codes, sec. 3137) it connotes mileage payable to the sheriff by the county in certain cases; in section 4605 (Rev. Codes, sec. 3138) it designates the recompense payable by the county to the sheriff for boarding prisoners; in sections 4606, 4607, 4611, 4612, 4614, 4615, 4616 (Rev. Codes, secs. 3139, 3140, 3144, 3145, 3147, 3148, 3149), and others it imports specific charges to be collected from private individuals for particular services; in section 4618 (Rev. Codes, sec. 3151) it refers to costs of publications; in section 4634 (Rev. Codes, sec. 3167) to the sheriff's mileage as well as his other charges; in section 4639 (Rev. Codes, sec. 3172) to the *per diem* of the county surveyor, to his charges for copies, *etc.*, and to his expenses for chainmen and markers, whether chargeable to the county or to private individuals; in section 4640 (Rev. Codes, sec. 3173) to the *per diem* and other charges of the coroner which are payable by the county; in section 4642 (Rev. Codes, sec. 3176) to the charges of the justice of the peace, whether collectible from the county in criminal cases, or from individuals in other matters; in section 4643 (Rev. Codes, sec. 3177) to the charges of the constable, whether collectible from the county in criminal cases or from individuals in civil actions; in section 4643 (Rev. Codes, sec. 3177) to mileage as among the fees of the constable; in sections 4648 and 4650 (Rev. Codes, secs. 3182, 3184) to the *per diem* and mileage of witnesses. In no way can it be ascertained whether an officer has collected illegal fees within the meaning of section 9006 without a reference to the Chapter on fees from which the above references are taken; with such references, it would be a perversion to say that such collection

occurred if the authorized moneys came from individuals, but not if they came from the county, or if they consisted of *per diem* or mileage instead of specific charges or particular services.

3. Besides the *Payne Case*, *supra*, this court had occasion in *State ex rel. Rowe v. District Court*, 44 Mont. 318, Ann. Cas. 1913B, 396, 119 Pac. 1103, to consider some of the aspects of appellant's present contention. There one Booher was sought to be removed from office under section 9006 for collecting illegal fees. The collection was from the county in good faith for services rendered, but it was held nevertheless that, since there was no legal warrant for it, the transaction constituted a collection of illegal fees for which removal, under section 9006, was possible. Elsewhere, too, the same result has been reached. Under the statute in North Dakota, Idaho and Utah, as here, county commissioners received *per diem* and mileage payable by the county; and in *State v. Richardson*, 16 N. D. 1, 109 N. W. 1026, *State v. Borstad*, 27 N. D. 533, Ann. Cas. 1916B, 1014, 147 N. W. 380, *Rankin v. Jauman*, 4 Idaho, 53, 36 Pac. 502, *Rankin v. Jauman*, 4 Idaho, 394, 39 Pac. 1111, *Ponting v. Isaman*, 7 Idaho, 283, 62 Pac. 680, and *Robinson v. Huffaker*, 23 Idaho, 173, 129 Pac. 334, it was expressly determined that a county commissioner who receives from his county *per diem* and mileage to which he is not entitled, either because not earned or not authorized by law, is guilty of collecting illegal fees for services rendered in his office, and subject to removal under provisions similar to section 9006 of our Code. And the same conclusion was reached in *Skeen v. Craig*, 31 Utah, 20, 86 Pac. 487, respecting a city councilman. In this case the court, upon the first appeal reversing a judgment below for the defendant, said: "Counsel for defendant insist that the facts as disclosed by the record do not bring the case within the provisions of section 4580; their contention being that this section refers to officers only who are paid by fees for specific services, or, being salaried officers, are yet required to charge and collect fees for specific services, and that, as a city

councilman is paid a stipulated and fixed salary, and in no way charged with the collection of fees of any kind whatsoever, he cannot be proceeded against under said section. It is conceded that the construction of the section of the statute under which this action is brought depends more upon the sense in which the term 'fees' is therein used than upon the technical definition of the word as contradistinguished from other terms denoting the compensation of public officers. The terms of this section of the statute wherein it refers to public officers and the 'charging and collecting illegal fees' are general, and are not confined to the fees charged and collected by any one class of public officers not liable to impeachment. Now, it is a well-recognized rule of statutory construction that general terms and expressions of a statute are to be given a general construction unless some other provision of the statute or the context itself shows that the legislature intended them to be used and applied in a limited or restricted sense. (Sutherland, Stat. Const., 2d ed., 392; Black on Interp. Laws, 136.) We fail to find anything in the phraseology of the section itself, or when it is read and considered in connection with other provisions of the statute relating to the general subject matter of the action, which restricts or limits the scope or operation thereof to only one class of officers. By its very terms the statute includes any officer (not liable to impeachment) who has been guilty of charging and collecting illegal fees. And its provisions are equally broad respecting 'illegal fees.' To bring the charging and collecting of illegal fees within the statute, it is not necessary that such fees be obtained from any specific source or sources, nor that they be charged or collected by an officer who is authorized by law to collect fees for specific services. The charging and collecting of illegal fees from the state, county, or municipality by a public officer for private gain, is as clearly within the statute as the charging and collecting of illegal fees from a private individual. It would seem that, if it were intended to limit proceedings of this kind to include only a certain or specified class of public officers who might become de-

linquent, the legislature would have said so. The legislature has not only failed to so state in so many words, but, as we have observed, there is nothing in any of the statutory provisions which relate to or have any bearing upon the subject matter of this class of actions from which such an intent can be inferred." We think that these authorities effectually dispose of appellant's contention.

It has been suggested—though it is not exploited in appellant's brief—that the only illegal fees for collecting which an officer can be removed under section 9006 are those received for services rendered in his office, and if the service for which collection be made is not required of the officer or authorized by law to be performed by him as such, it is not service rendered in his office; so that, whatever legal animadversion he may be subjected to for the collection, assuming the charge to be without legal warrant, there can be no removal under section 9006. In a certain sense this is obvious; but it is not illuminating. At the time involved here county commissioners had general supervision over highways (Laws 1915, Chap. 141, sec. 2), were charged with the establishment, maintenance and control of the same (Laws 1915, Chap. 141, sec. 2; Rev. Codes, sec. 2894, subd. 4); it was their function to manage and care for highways as other interests committed to their charge (Rev. Codes, sec. 2894, subd. 22), and in that behalf they could do or cause to be done whatever might be necessary (Rev. Codes, sec. 2894, subd. 25; Laws 1915, Chap. 141, sec. 2). If these provisions mean anything at all, it is that county commissioners could in virtue of their office personally superintend and effectively direct the work of construction and repair upon highways and could depute one of their number to see and speak for them respecting the same; but, unless payment is authorized for such service none can be lawfully made, and to charge and collect for it is to charge and collect illegal fees for service "rendered in his office."

II. In oral argument it was insisted that there are two [2] statutory provisions, *viz.*, sections 3194 and 2952, Revised

Codes, under which it is permissible for commissioners to receive compensation for such service as was rendered in the present instance, and that therefore no illegal fees were collected. We cannot reconcile this with the theory of the briefs, nor does it at all conform to the postulates of the *Payne Case* referred to above. We consider it, however, in order that the matter may be set at rest. The sections referred to are as follows:

“3194. Members of the board of county commissioners each receive eight dollars per day and fifteen cents per mile for the distance necessarily traveled in going to and returning from the county seat and his place of residence.”

“2952. All claims against the county presented by members of the board for per diem and mileage, or other service rendered by them, must be verified as other claims, and must state that the service has been actually rendered.”

If these two sections were the only provisions reflecting on the subject, it might be possible to imply from the phrase “or other service rendered,” in section 2952, and from the absence of any express restriction in section 3194, that the commissioners should have compensation for any service whatever rendered to the county—for those to which *per diem* properly applies at the rate of \$8 per day, together with mileage, and for other services on some basis not stated, perhaps the reasonable value of the service. Section 2952, however, is in itself no authorization to take money from the public treasury for any purpose, and cannot be employed to bolster up a claim for which independent authority does not exist (*Irwin v. County of Yuba*, 119 Cal. 686, 52 Pac. 35); it is a mere prescription, touching the manner in which commissioners' claims for compensation, elsewhere authorized, shall be formulated and is designed in connection with section 2945 to enable the board to determine in the first instance whether it will even consider the claim (*Christie v. Board of Supervisors*, 60 Cal. 164). Moreover, these sections are not the only ones upon the subject. Section 2893 provides: “Each member of the board of county commissioners is entitled to eight dollars per day for each day's attendance on the

sessions of the board, and ten cents per mile for the distance necessarily traveled in going to and returning from the county seat and his place of residence, and no other compensation must be allowed''; and sections 12 and 13 of Article III in Chapter 141, Laws of 1915, authorize commissioners especially ordered by the board to inspect the condition of contract construction work on highways and bridges to receive \$8 per day and actual traveling expenses. It is not impossible to harmonize these provisions; construing them together, it may be said that, as respects *per diem*, a commissioner may receive \$8 per day for each day's attendance upon sessions of the board and for each day given to inspection of contract roadwork under order of the board, but shall receive no other compensation. In every instance his claim must be verified as other claims. Conceding, however, that as to sections 2893, 2952 and 3194, there is such a difference in implication as to present an essential conflict, then, for reasons prescribed in the Code itself, section 2893 must prevail. All are original sections in the Code of 1895 (Pol. Code, secs. 4222, 4293, 4660), but section 2893 is an obvious carrying forward of a pre-existing provision (sec. 347, 5th Div., Rev. Stats. 1879; sec. 755, 5th Div., Comp. Stats. 1887), with changes as to mileage and the fund from which payment shall be made. Section 2893 is part of the Article and Chapter (Art. I, Chap. II, Tit. II) which defines the organization, term and compensation of county commissioners, and is particularly germane to that subject. Section 2952 is part of the Article and Chapter (Art. VI, Chap. II, Tit. II) which relates to "Other Powers and Restrictions" in county government; and section 3194 is found in the general Chapter (Chap. IV, Tit. II) on salaries and fees of public officers. The rule established by the Code is that, if the provisions of any Article conflict with or contravene the provisions of another Article in the same Chapter, the provisions of each Article must prevail as to all matters and questions arising out of the subject matter of such Article (Rev. Codes, sec. 3557), and if the provisions of any Chapter conflict with or contravene the provisions of

another Chapter of the same Title, the provisions of each Chapter must prevail as to all matters and questions arising out of the subject matter of such Chapter (Rev. Codes, sec. 3556).

It is doubtless true that, in the case of a commissioner acting honestly and with a view to the efficient discharge of the duties of his office, the conclusion is a harsh one which results not only in the restoration of moneys actually earned, though illegally claimed, but also in his removal from office. This, however, cannot be helped. Section 9006 is general, makes no distinctions, leaves no room for judicial discretion. It was designed to serve a far-seeing public purpose, and to deny its application to this case, upon the grounds urged here, would be to destroy its value in other cases where its effect may be more certainly needed.

The judgment appealed from was commanded by the facts stated, and is therefore affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

STATE, RESPONDENT, v. CALLAGHAN, APPELLANT.

(No. 3,970.)

(Submitted April 23, 1917. Decided May 28, 1917.)

[165 Pac. 753.]

(For syllabus and names of counsel, see *State v. Story, ante*, p. 573.)

MR. JUSTICE SANNER delivered the opinion of the court.

The questions presented by this appeal are the same and arise in the same way as those presented in *State ex rel. Langohr v. Story, ante*, p. 573, 165 Pac. 748. On the authority of that decision, and for the reasons stated therein, the judgment appealed from is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

STATE, RESPONDENT, v. OVERSTREET, APPELLANT.

(No. 3,971.)

(Submitted April 23, 1917. Decided May 28, 1917.)

[165 Pac. 753.]

(For syllabus and names of counsel, see *State v. Story*,
ante, p. 573.)

MR. JUSTICE SANNER delivered the opinion of the court.

The questions presented by this appeal are the same and arise in the same way as those presented in *State ex rel. Langohr v. Story*, *ante*, p. 573, 165 Pac. 748. On the authority of that decision, and for the reasons stated therein, the judgment appealed from is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. CHIEF JUSTICE HOLLO-
WAY concur.

BARKER ET AL., RESPONDENTS, v. CONDON ET AL.,
APPELLANTS.

(No. 3,840.)

(Submitted March 16, 1917. Decided May 28, 1917.)

[165 Pac. 909.]

*Mines and Mining—Extralateral Rights—Presumptions—Evi-
dence—Insufficiency.*

Mines and Mining—Extralateral Rights—Evidence—Insufficiency.

1. In an action to recover the value of ore alleged to have been taken by defendants from a vein having its apex within the surface boundaries of the plaintiff's quartz lode claim, and for a perpetual injunction, the latter's testimony consisting of opinions and beliefs that in some way, not made to appear by actual development, the vein did so apex, *held* insufficient to warrant the relief demanded.

Same—Extralateral Rights—Identity of Vein Prerequisite.

2. In order that a quartz lode vein may be followed extralaterally, identity throughout is essential.

[As to extralateral rights under the law of mines and minerals, see note in 58 Am. St. Rep. 263.]

Same—Quartz Lode Veins—Presumptions.

3. In the absence of a contrary showing, the presumption obtains that a vein found beneath the surface of one's quartz lode claim will continue to extend upward at the same angle as exhibited below.

Appeal from District Court, Cascade County; J. B. Leslie, Judge.

ACTION by Leonie E. Barker and another against Daniel Condon and others. From a judgment in favor of plaintiffs and an order denying defendants a new trial, the latter appeal. Reversed and remanded.

Mr. James A. Walsh and Mr. W. F. O'Leary, for Appellants, submitted a brief; Mr. Walsh argued the cause orally.

Messrs. Cooper, Stephenson & Hoover, for Respondents, submitted a brief; Mr. Sam Stephenson argued the cause orally.

STATEMENT OF THE CASE BY THE JUDGE DELIVERING THE OPINION.

This action was brought to recover the value of ore taken by defendants from a vein alleged to apex in the Ripple lode mining claim, owned by plaintiffs. Plaintiffs demanded judgment for a perpetual injunction and for the value of the ore extracted.

Defendants in their answer denied that they had extracted ore from any vein having its apex within the Ripple lode, and denied generally the other allegations of the complaint. Further answering, the defendants alleged that the Montana Gold, Silver, Platinum & Tellurium Mining Company was the owner of the Tom Hendricks and the Sixteen to One lode claims, which, at the times mentioned in the complaint, were under lease to the defendants; that the Sixteen to One lode lies between the Tom Hendricks lode and the Ripple lode; that the vein from which the defendants extracted the ore in dispute is the Sixteen to One claim and Tom Hendricks claim, and within the exterior boundaries thereof extended vertically downward; and that no ore was taken from said vein outside of vertical planes drawn through the end lines of said claims.

The case was tried to the court and a jury. At the conclusion of the evidence the case was dismissed as to T. C. Power and Louis Heitman, originally joined as defendants. Plaintiffs offered evidence in support of their contention that the vein from which the ore was taken had its apex in the Ripple claim and was disclosed in a little tunnel within the claim and near corner No. 4. The defendants offered evidence tending to show that the vein from which the ore was extracted was nearly vertical, and that if it maintained the same dip in its course upward to the surface, it would not apex within the Ripple lode. At the conclusion of all the evidence, defendants moved for a directed verdict on the ground, among others, that there was no evidence to show that the vein from which the ore was taken had its apex in the Ripple lode. This motion was overruled. The jury brought in its special findings in favor of plaintiffs. The net value of the ore extracted was found by the referee to whom the matter was referred by the court to be \$144.05. Thereafter judgment was entered in favor of plaintiffs. This appeal is from the judgment and from the order denying a new trial.

HONORABLE R. LEE WORD, a Judge of the First Judicial District, sitting in place of the Chief Justice, delivered the opinion of the court.

All the questions raised by the assignments of error are resolved in favor of the respondents, except one, and that is: Is there any evidence in the record showing or tending to show that the vein from which the ore was taken has its apex within the Ripple lode? In view of the admitted fact that the ore extracted came from beneath the surface of the Tom Hendricks and Sixteen to One claims, respondents concede that the burden is upon them to establish their right to go within the boundaries of said claims and extract ore. Have the plaintiffs and respondents discharged this burden resting upon them? Have they established by competent or any evidence the existence, within the lines of their claim, of the apex of the vein or of that portion of the vein from which the defendants extracted the ore sued

for? Upon this point the evidence offered by plaintiffs is in substance as follows:

John W. Wade testified that he had surveyed the Ripple lode and the tunnels, shafts and upraises made by plaintiffs in the working and development of that claim. That Exhibit "C" for plaintiffs was a map of the Ripple lode, showing these workings, drawn to scale, and also included the Sixteen to One and a portion of the Tom Hendricks claims; that the Ripple vein has a north and south course and dips east into the mountain; that in a little tunnel about twenty feet long, near corner No. 4 of the Ripple lode, and within that claim, there is a well-defined vein about eighteen inches or two feet wide; that this vein carries ore, has a dip to the east of about twenty feet in a hundred, and, in the opinion of the witness, is the apex of the Ripple vein and the apex of the vein from which the ore was taken beneath the surface of the Sixteen to One and Tom Hendricks lodes; that upon Exhibit "C" the witness has drawn a red line marked "Apex as Developed by Surface Openings," to indicate the cropping or upper edge of the apex of the Ripple vein; that the dotted line at the south end of the claim is an extension of the south end line, marked "3" and "4," in the same direction; that the lines in red, marked "Big Snowy Tunnel," indicate the workings of the defendants beneath the surface of the Sixteen to One and Tom Hendricks claims. The witness concludes that the vein in the little tunnel near corner No. 4 is the apex of the Ripple vein and the same vein from which the ore in dispute was taken, because it has about the same dip and the same character of ore as has the vein disclosed in the Big Snowy Tunnel; because the vein in the little tunnel is on a line with the upraises from the vein to the surface farther north in the Ripple claim; for that the cross-cuts on the surface, and made by the Joki tunnel for a distance of nearly two hundred feet, and by the Tom Hendricks tunnel, run by the defendants, show that there is no other vein than the Ripple vein from which the disputed ore could come; that the Ripple vein always dips into the mountain,—that is, to the east; that the veins below and to

the west dip to the west, and that there is no other vein which could apex in the little tunnel near corner No. 4 except the Ripple vein; that most of the openings where they took the dip of the vein are necessarily short, but that the dips show a trend out of the ground that will bring the apex into the red line marked "Apex as Developed by Surface Openings"; that in the Lower Tunnel, at a point marked "E-F," about 755 feet north of corner No. 4, the vein is almost vertical; that beyond the south end line of the Ripple claim the development work done by defendants shows that the vein turns southwesterly, and the dip of the vein is about sixty-one feet in a hundred, and that, keeping that dip, it would apex below where it does apex near corner No. 4 of the Ripple lode; that at the point "C-D" upon the map about 390 feet north of corner No. 4, the Lower Tunnel is about 250 feet deeper than the Pierce-Westgard Tunnel; that in this distance the variation is thirty-one feet; that the Pierce-Westgard Tunnel is 140 feet deeper than the Weidell Tunnel, at the point "C-D," and that between these tunnels at this point the vein dips from twenty to twenty-five feet; that from the Weidell Tunnel to the surface there is an upraise eighty feet in length, marked "Weidell Upraise"; that the dip of the vein between the surface and the Weidell Tunnel is about thirty feet.

On cross-examination the witness Wade testified in substance as follows: That the Weidell Tunnel is about 160 feet above the Westgard Tunnel; that at the point "C-D" there is no upraise from the Westgard Tunnel to the Weidell Tunnel; that the top of the Linquist upraise is 141 feet above the Westgard Tunnel, figured vertically; that at the point marked "E-F Upraise to Surface" the vein is vertical between the Lower Tunnel and the Westgard Tunnel, and between the Westgard Tunnel and the surface there is a dip of fifteen feet, or twenty feet in a distance of eighty feet, and below it is nearly vertical; that at the Weidell upraise it is 161 feet from the Westgard Tunnel up to the Weidell Tunnel, and from the Lower Tunnel up to the Westgard Tunnel it is 253 feet; perpendicularly it is about thirty feet shorter, the dip being about ten feet in a hundred;

that at the point "C-D," the last cross-section going south, there is more variation between the tunnels than at any other point; that at the point where the Lower Tunnel as projected crosses the south end line of the Ripple claim, it is 253 perpendicularly, and about thirty-five feet laterally below the Westgard Tunnel; that at the point where the Joki Tunnel cuts the vein it is about ninety feet vertically, and about fifteen feet laterally, above the Westgard Tunnel; that the red line marking the theoretical apex is about sixty-five feet from where the Joki Tunnel crosses the drift on the vein; that the witness has no knowledge of the Ripple vein coming to the surface at any point between the Weidell upraise and the south end line of the Ripple claim, a distance of 387 feet; that the witness does not know where the vein exposed in the Joki Tunnel—the uppermost tunnel—comes to the surface; that the vein shows in the south drift from the Joki Tunnel for a distance of 112 feet; that the south end of this drift from the Joki Tunnel is not directly over the Westgard Tunnel, but very close to it; that it lacks two, or three, or five feet of being directly over that tunnel; that the perpendicular distance from the south end of this drift to the Westgard Tunnel is about 120 feet; that the vein continues beyond the south end of the drift; that the lead may turn to the right, but the vein continues; that at the most southerly part in this drift from the Joki Tunnel, as shown upon the map Plaintiff's Exhibit "C," the Westgard Tunnel, the Barker Winze below the Westgard Tunnel, and the Joki Drift, are almost in a perpendicular line, that is to say, the vein disclosed in each is nearly perpendicular; that the lead after it leaves the Ripple claim on the south makes an abrupt turn to the right, of forty-five degrees, and shows a slope of sixty-one degrees, to the end of the Ripple; that in the little tunnel near corner No. 4 of the Ripple, the vein is eighteen or twenty inches wide; that the little tunnel runs across the vein; that the vein dips into the hill; that only five or six feet of this vein are exposed; that the vein has a dip of twenty-one or twenty-two feet to the hundred—a very decided dip; that this little tunnel is fifteen or sixteen feet from corner

No. 4; that the difference in elevation between the point where the apex line—the red line—crosses the south end line and the Westgard Tunnel is 325 feet; that in this distance there are no developments to show where the vein is; that we have a measurement of twenty-three feet to the hundred between defendants' and plaintiffs' workings, which, if maintained to the surface, would bring the apex close to the vein in the little tunnel near corner No. 4.

On further cross-examination, the witness Wade testified that at the point "H," about 210 feet north from corner No. 4, the pitch from the Westgard Tunnel to the Joki Tunnel is eight feet in a hundred; that the pitch from the Joki Tunnel to the theoretical apex is about sixty feet in a hundred; that the witness wishes the jury to understand that at the point "H" he has no idea or conception or belief that the apex of the vein at that point would reach the apex indicated by the red line; that to what extent the actual apex will leave the theoretical apex line between the Weidell upraise and the end line of the claim cannot be told; that the wave of the lead as indicated below and particularly as indicated at the point beyond the line of the Ripple ground, might do anything and still reach what is the apex right here in the little tunnel; that it is all theoretical except from "this point to this point." "Q. When you say 'this point,' what do you mean? A. I mean the point over the Weidell upraise. It is all conjecture as to the actual position beyond the development in the lower tunnel. Q. Does the vein in the little tunnel dip to the point marked '3' at the southerly end? A. No. It dips to the east. It is not my contention, and not that of any of our witnesses, that the little vein has the same dip of the other one. It is all conjecture as to the actual position beyond the development in the lower tunnel, or that the other one maintains its dip until it reaches there. I am sure it will not. After it reaches this point it will rise a short distance and then will strain up and fall back as it always does. Q. Now, Mr. Wade, it being 375 (387) feet from the Weidell upraise—your last observation and this little tunnel—and

approximately 400 feet from that tunnel down to the Big Snowy Tunnel, and all that is undeveloped; nothing to show the trend or dip of the vein, and as you say these veins are liable to dip over and strain up, how can you base any theory upon which you can say to the jury that the apex is in any particular place?

A. Well, it is impossible for any mortal man to tell to what extent that vein will wave and in what particular manner it will come to the surface and reach the point we have indicated here. In what manner it will reach there no mortal man can tell until it is developed and run through; but it is plain to my mind that it does reach there, because this apex belongs to something, and if it doesn't belong to something else in the neighborhood, it must belong to this lead."

Other witnesses called by plaintiffs gave support to the testimony of Mr. Wade upon the question here considered. Gus Weidell, a witness for plaintiffs, testified on his direct examination that at the point in the Big Snowy Tunnel, referred to by both Wade and Leininger as a place where the vein had its greatest dip, there did not seem to be any walls; that there were no solid walls. Charles W. Helmick testified that there was a vein definitely disclosed on the north side of the little tunnel near corner No. 4; that the ground at that point was pretty badly shattered; that there was a more or less defined wall on the east side; that the vein was fifteen or twenty inches wide, with an eastern dip.

A summary of plaintiffs' evidence discloses that, in the little tunnel near corner No. 4, the ground is pretty badly shattered; that this tunnel is about twenty feet long; that a vein is disclosed therein having a more or less defined wall on the east side; that this vein has not been developed laterally; that it dips to the east; that the nearest surface opening on the vein is the Weidell upraise, 387 feet north; that the next point where the Ripple vein comes to the surface is the Linquist upraise, 210 feet north of the Weidell upraise and that the next and last point where the vein reaches the surface is the Pierce and Westgard upraise, 165 feet north of the Linquist raise; that at the

Pierce and Westgard upraise the lower tunnel is about 250 feet below the Westgard Tunnel, and the Westgard Tunnel is about ninety feet below the surface. The Weidell Tunnel at the Weidell upraise is about eighty feet below the surface; the Westgard Tunnel about 140 feet below the Weidell Tunnel, and the lower tunnel about 250 feet below the Westgard Tunnel. At the point where the Joki Tunnel cuts the vein, the distance to the surface is about ninety feet; the Westgard Tunnel is about 190 feet below the Joki Tunnel at this point, and the lower tunnel about 240 feet below the Westgard Tunnel. At the Pierce and Westgard upraise the vein is vertical between the lower and the Westgard tunnels; and between the Westgard Tunnel and the surface, a distance of about ninety feet, the vein departs thirty feet from the vertical. At the Weidell upraise the vein dips about forty feet between the lower tunnel and the Weidell Tunnel, a distance of about 390 feet; from the Weidell Tunnel to the surface the dip of the vein is greater. Going south from the Weidell upraise, the vein straightens up. At a point about forty feet north of the line of the Ripple claim between corners 4 and 5, the vein is nearly vertical, and it maintains this position for a distance of 150 feet or more, going south, in and through the ground claimed by the defendants.

It is to be noted that at the place in the defendants' claims from which the disputed ore was mined, east of, and a distance horizontally of about 120 feet from the vein in the little tunnel, and over 400 feet beneath the surface, the vein is nearly vertical; and that, if it maintains the same dip to the surface, it will come up within the surface boundaries of defendants' claims. From the whole evidence offered by plaintiffs, we conclude that it does not appear even probable that the apex of the vein from which the ore was taken is within the Ripple claim. Going south from the Weidell upraise toward the vein in the little tunnel, a distance of 387 feet, no one can say from the development now upon the Ripple claim where the Ripple vein will apex, much less that it will apex in the red line marked upon the map, "Apex as Developed by Surface Openings." True, as disclosed in the Pierce-Westgard and Weidell upraises,

the dip of the vein is greater as it nears the surface; but at no point south of the Weidell upraise does the vein as it appears in the tunnels or the stopes have a dip which, if maintained to the surface, would bring it out on or near the theoretical apex line. At the south end of plaintiff's claim the vein is nearly vertical. It is nearly vertical in the Big Snowy Tunnel, driven by the defendants, and does not make a turn or bend to the west until beyond the point where it is cut by plaintiffs' south [1] end-line continued in its own direction. At most we have an opinion or belief declared by plaintiffs' witnesses that in some way, not made to appear by any development work now existing, the apex of the vein from which defendants took the ore sued for is in plaintiffs' claim, and is shown in the little tunnel near corner No. 4. But this vein in the little tunnel has never been developed so much as a foot beyond the tunnel walls. Whether it persists or disappears; whether it straightens up or flattens out, are all matters of conjecture.

If plaintiffs had been found extracting ore from a vein beyond their side-lines and beneath the surface of defendants' claims, the presumption would be against them, and *prima facie* they would be trespassers until they made it appear that they got there by following the lode on its dip from its apex within [2] their lines. In order that a vein may be followed extralaterally, identity throughout is essential. (*Butte & Boston Min. Co. v. Lexington*, 23 Mont. 177, 75 Am. St. Rep. 505, 58 Pac. 111.) Not only are the defendants *prima facie* entitled to all ore beneath the surface of their claims (*Maloney v. King*, 25 Mont. 188, 64 Pac. 351; *Parrot S. & C. Co. v. Heinze*, 25 Mont. 139, 87 Am. St. Rep. 386, 53 L. R. A. 491, 64 Pac. 326; *Maloney v. King*, 30 Mont. 158, 76 Pac. 4; *Anaconda Copper Min. Co. v. Pilot-Butte Min. Co.*, 52 Mont. 165, 156 Pac. 409), [3] but as a working hypothesis it is fair to assume. in the absence of a contrary showing, that the vein or veins there found will continue to extend upward at the same angle as exhibited below. (*Brewster v. Shoemaker*, 28 Colo. 176, 89 Am. St. Rep. 188, 53 L. R. A. 793, 63 Pac. 309, 311.) In any event, ore presumptively belonging to defendants, because beneath the

surface of their claims, cannot rightfully be taken from them, for that the owners of an adjoining claim have produced witnesses who entertain the opinion that the vein containing the ore has its apex in this adjacent claim, and this presumption which attends defendants "is not overturned by speculative conjecture or intelligent guess." (*Heinze v. Boston & M. etc. Min. Co.*, 30 Mont. 484, 488, 77 Pac. 421; *Collins v. Bailey*, 22 Colo. App. 149, 125 Pac. 543.)

That plaintiffs might, by work done upon their vein from its apex down to the disputed territory, furnish substantial evidence that their claims, as to the identity of their vein with the vein found in defendants' ground, are well founded need not be questioned here; it suffices that they have failed to present such evidence in this suit; and as it appears they have presented all the evidence at this time available to them, it follows that the judgment should be reversed and the cause remanded with directions to dismiss the complaint. It is so ordered.

Reversed and remanded.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

Rehearing denied June 28, 1917.

STATE EX REL. BOYLE, RELATOR, v. HALL, RESPONDENT.

(No. 4,045.)

(Submitted April 26, 1917. Decided May 29, 1917.)

[165 Pac. 757.]

Quo Warranto—Scope of Writ—"Public Office"—State Board of Railroad Commissioners—Chairmanship.

Quo Warranto—Scope of Writ.

1. A private individual is limited in his right to the remedy by *quo warranto*, to a case in which he claims to be entitled to a public office unlawfully held and exercised by another.

[As to when *quo warranto* may be maintained by private person, see note in 125 Am. St. Rep. 633.]

Same—"Public Office"—Definition.

2. To constitute an office a public one, the duties pertaining to it must concern the public and be imposed by public authority; they must imply personal responsibility as distinguished from the merely clerical acts of an agent or servant; and while the elements of fixed service and compensation are not indispensable, their absence indicates to some extent that the office is not a public one.

Same—"Public Officer"—Definition.

3. A public officer is a part of the personal force by which the state thinks, acts, determines and administers to the end that its Constitution may be effective and its laws operative.

Same—State Board of Railroad Commissioners—Chairmanship—Not Public Office.

4. *Held*, that the chairmanship of the board of state railroad commissioners is not a public office, and that therefore the writ of *quo warranto* does not lie to determine the right of one of its members to act as chairman.

Original application for writ of *quo warranto* by the State, on the relation of Daniel Boyle, against J. H. Hall. Dismissed.

Mr. E. G. Toomey and *Messrs. Galen & Mettler*, for Relator, submitted a brief; *Mr. Toomey* argued the cause orally.

The chairmanship of the board of railroad commissioners is a public office and the occupant thereof a public officer. An office is created by law. (Mechem on Public Officers, 1st ed., 5.) It involves a continuing public duty. (*Id.* 6, 7.) It involves performance of public duty. (*Id.* 7.) Formality of designation is not essential. (*Id.* 8; see, also, *Fergus v. Russel*, 270 Ill. 304, Ann. Cas. 1916B, 1120, 17 Ann. Cas. 451, 110 N. E. 130; *Eliason v. Coleman*, 86 N. C. 235.) In *People v. Coler*, 166 N. Y. 1, 82 Am. St. Rep. 605, 52 L. R. A. 814, 59 N. E. 716, we find that "An officer is a part of the personal force by which the state acts, thinks, determines, administers and makes effective its Constitution, and its laws operative." (*Schmitt v. Dooling*, 145 Ky. 240, Ann. Cas. 1913B, 1078, 16 L. R. A. (n. s.) 881, 140 S. W. 197.) "The chairman of a board of school trustees is a public officer, and the office of chairmanship a public office." (*Riggs v. Polk County*, 51 Or. 509, 95 Pac. 5.)

However, even though the chairman of the board of railroad commissioners of the state of Montana should not be considered a public office, *quo warranto* will lie to test title to an office in a corporation created by the state (sec. 6943, Rev. Codes), and

said board is a corporation. (*Id.*, secs. 4390, 4391; *Williams v. Board of Commrs.*, 28 Mont. 360, 72 Pac. 755.)

The tenure of the office of chairman is declared by statute to be at the pleasure of the board. The absolute power of a board vested with a power of election or appointment of an individual to serve "at the pleasure of the board," as respects removal, is exemplified in the following decisions, where the phrase has been judicially construed: *Commonwealth v. McGann*, 213 Mass. 213, 100 N. E. 355; *Stebbins v. Police Commrs. of Springfield*, 196 Mass. 365, 82 N. E. 42, 43; *London v. City of Franklin*, 118 Ky. 105, 80 S. W. 514; *Rogers v. Congleton*, 27 Ky. Law Rep. 109, 84 S. W. 521; 1 Words and Phrases (2d Series), 350, 351.

If the tenure of the office of chairman is not expressly declared by statute to be at the pleasure of the board, failure to provide for a fixed term works an identical result. "The word 'term,' when used in reference to the tenure of office, means, ordinarily, a fixed and definite time, and does not apply to appointive offices held at the pleasure of the appointing power." (Mechem on Public Officers, sec. 385; *Crovatt v. Mason*, 101 Ga. 246, 28 S. E. 891; *State v. Breidenthal*, 55 Kan. 308, 40 Pac. 651; *State v. Tallman*, 24 Wash. 426, 64 Pac. 759; *State ex rel. Withers v. Stonestreet*, 99 Mo. 361, 12 S. W. 895; 8 Words and Phrases (1st Series), 6920).

It being established by the plain terms of the statute that the tenure of the incumbent of the office of chairman of the board of railroad commissioners is not fixed, the officer is then within the rule that permits of his removal by the appointing power, at its sole will, and without cause or notice. (29 Cyc. 371; 23 Am. & Eng. Ency. of Law, 2d ed., 405; Mecham on Public Officers, sec. 445; Throop on Public Officers, sec. 304 *et seq.*; *United States v. Avery*, Deady, 204, 24 Fed. Cas. No. 14,481; *Higgins v. Cole*, 100 Cal. 260, 34 Pac. 678; *Murphy v. Webster*, 131 Mass. 482, 488; *State v. Lane*, 53 N. J. L. 275, 21 Atl. 302; *People v. Board of Education*, 84 Hun, 417, 32 N. Y. Supp. 377; *State*

v. *Dahl*, 140 Wis. 301, 122 N. W. 748.) Nor is the rule altered by any action taken by the appointing power, whether it attempts to appoint the officer for a fixed term or by by-laws restricts the power of removal to cases where cause for removal exists. (*State v. Archibald*, 5 N. D. 359, 66 N. W. 234; *Wright v. Gamble*, 136 Ga. 376, Ann. Cas. 1912C, 372, 35 L. R. A. (n. s.) 866, 71 S. E. 795.)

Mr. H. C. Hall, for Respondent, submitted a brief and argued the cause orally.

It is the theory of the respondent that the writ of *quo warranto* will not lie under the facts alleged in the complaint herein for three reasons:

The position of chairman of the board of railroad commissioners is not a public office within the meaning of section 6947, Revised Codes. Public officers are usually required by law to take the oath of office, and this fact goes far in determining the character of the duty. (Mechem on Public Officers, sec. 6; *State v. Wilson*, 29 Ohio St. 347; *Kavanaugh v. State*, 41 Ala. 399; *Lindsey v. Attorney General*, 33 Miss. 508; *Sweeny v. Mayor*, 5 Daly (N. Y.), 274.) We herewith cite cases to the effect that similar positions are not public offices within the meaning of the statute. (*Cochran v. McCleary*, 22 Iowa, 75; *Reynolds v. Baldwin*, 1 La. Ann. 162; *State v. Kiichli*, 53 Minn. 147, 19 L. R. A. 779, 54 N. W. 1069; *Prichard v. McBride*, 28 Idaho, 346, 154 Pac. 624.)

Though the position be a public office, it is one held at the pleasure of the appointing power, and *quo warranto* will not lie. In this portion of the brief we shall admit for the sake of the argument that the position of the chairman of the board of railroad commissioners is a public office. Granting this to be a fact, the office is either held for a certain specified term or at the pleasure or will of the appointing or electing board. It would seem to be the theory of the relator herein that it belongs to the latter class, and that the board, whensoever it lists, may remove its chairman and elect a new one. Under such

theory the writ of *quo warranto* will not lie. Before *quo warranto* will lie the office must be a permanent substantive office, and not merely a position held at the will or pleasure of the appointing power. (32 Cyc. 1422; High on Extraordinary Legal Remedies, sec. 626; *Darley v. Regina*, 12 Cl. & F. 520; *Regina v. Bagly*, 2 Ir. R. 335; *Regina v. Simpson*, 19 Wkly. Rep. 73; *State v. Stewart*, 6 Houst. (Del.) 359; *State v. Champlin*, 2 Bail. (S. C.) 220; *Attorney General v. Cain*, 84 Mich. 223, 47 N. W. 484; *Portman v. Fish Commrs.*, 50 Mich. 258, 15 N. W. 106; *People v. Ridgley*, 21 Ill. 65; *Attorney General v. McCaughey*, 21 R. I. 341, 43 Atl. 646.)

Granting the position is a public office, the term is for specified length of time, and respondent has never been removed therefrom. (*Fuller v. Miller*, 32 Kan. 130, 4 Pac. 175; *Prichard v. McBride*, 28 Idaho, 346, 154 Pac. 624.) Under the allegations of the complaint, J. H. Hall has never been removed from the office of chairman of the railroad commission. There having been no removal, there was no vacancy to which Daniel Boyle could be elected or appointed. Nor could there be any usurpation of the office by respondent. Under such circumstances there is no occasion for the writ of *quo warranto*, and respondent's demurrer must be sustained.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

By Chapter 37, Laws of 1907 (Rev. Codes, secs. 4363-4399), the "board of railroad commissioners of the state of Montana" was created, and by that Act, and Acts supplementary thereto, its powers and duties are defined. The board consists of three members, each elected for a term of six years, and the present members are J. H. Hall, J. E. McCormick and Daniel Boyle. Hall was elected in 1912, McCormick in 1914 and Boyle in 1916. On January 1, 1917, Hall was duly elected chairman and continued in that capacity until April 16, when, at a regular meeting of the board at which all three members were present, by the votes of McCormick and Boyle he was deposed and Boyle elected chairman

in his stead. Hall refused to abide by the order, and has since claimed and assumed to act as chairman. This proceeding in the nature of *quo warranto* was instituted by Boyle to have determined the right or title to the chairmanship of the board. To the complaint, which sets forth the proceedings fully, the defendant demurred, and, electing to stand on his demurrer, the matter was submitted for final determination. Defendant presents three contentions:

1. That the chairmanship of the board is not a public office. If this be sustained, the other contentions need not be noticed; for though the authority of the state (represented by the attorney general) to invoke the remedy by *quo warranto* is quite [1] extensive (Rev. Codes, secs. 6943–6946), a private individual is limited in his right to the remedy to a single case, *viz.*, a case in which he claims “to be entitled to a *public office* unlawfully held and exercised by another” (sec. 6947). The question before us *in limine* is: Is the chairmanship of the board of railroad commissioners a public office, with public functions to be performed by the occupant independently of his duties as a member of the railroad commission?

Courts and text-writers have undertaken to define the term [2] “public office,” and to prescribe certain criteria by which to determine whether, in a given instance, a public office is involved, but their efforts have been expended with rather indifferent success. The tests applied and found sufficient in one case have proved altogether inapplicable in another. The authorities are, however, quite generally agreed that the character of the functions to be performed is a primary consideration, if not a determining factor. (23 Ency. of Law, 2d ed., 323.) The duties attached to the position must concern the public directly, and must be imposed by public authority—not by contract. (Mechem on Public Officers, 1–6; Throop on Public Officers, 3, 4; Wyman’s Administrative Law, sec. 44.) The duties must be public in the sense that they comprehend the exercise of some portion of the sovereign power and authority of the state, either in making, administering or executing the laws.

(*Eliason v. Coleman*, 86 N. C. 235; *Commonwealth v. Bush*, 131 Ky. 384, 115 S. W. 249.) They must be public, also, in the sense that they imply the element of personal responsibility, as distinguished from the merely clerical acts of an agent or servant. (*Attorney General v. Tillinghast*, 203 Mass. 539, 17 Ann. Cas. 449, 89 N. E. 1058.) In other words, a public officer is a part of the personal force by which the state thinks, acts, [3] determines and administers to the end that its Constitution may be effective and its laws operative. (*People v. Coler*, 166 N. Y. 1, 82 Am. St. Rep. 605, 52 L. R. A. 814, 59 N. E. 716.) While the elements of fixed term and compensation cannot be said to be indispensable to a public office, they are *indices* the presence of which points to the existence of such a position, and the absence of which indicates to some extent the contrary conclusion.

The board of railroad commissioners is the creature of statute. It has such authority as is conferred expressly or necessarily implied from that which is expressed. It is subject at all times to legislative regulation and control. Its officers and employees—even the members of the commission—may be dismissed from the service of the state by a repeal of the law which created the [4] board. Whether, then, the chairmanship of the board is a public office, with public duties and functions independently of the duties and functions which are attached to the office of commissioner, depends upon the intention of the legislature as manifested in the Act, when considered in the light of the general rules referred to above, and which are presumed to have guided the lawmakers to their ultimate determination.

The only mention of the chairmanship is found in section 4367, wherein it is provided that the board shall “organize by electing one of its members as chairman.” While this is not the creation of the position by specific legislative enactment, it might be deemed sufficient if other and indispensable elements of a public office were present. Counsel have not directed our attention to any public duties or functions attached to the chairmanship by the legislature, and our research has disclosed but

a single reference, *viz.*: "The state shall furnish said board with suitable offices in the state capitol building at Helena, Mont., and provide it with all necessary furniture, stationery and printing, *upon requisitions signed by the chairman of said board.*" (Sec. 4369.) Throughout the original Act and the supplemental Acts the references are uniformly to the duties, powers and privileges of the board, while the chairmanship is dismissed by the brief references above. Any member of the board may administer oaths (sec. 4365), or verify the vouchers for the board's expenses (sec. 4370).

Can it be said, then, with any degree of seriousness that a position to which are attached no duties, powers or prerogatives other than the authority to sign orders for paper, stamps and pencils is a public office, the incumbent of which is required by law to perform a portion of the sovereign power of the state? To suggest the question is to answer it. A review of these statutes would seem to indicate beyond the possibility of a doubt that while the board is created with important public functions to perform, and clothed with authority to make effective the purpose of its creation, the legislature, imposing trust and confidence in the intelligence and integrity of the members, referred to the board, as an entity, all matters of board regulation and control.

Section 4365, provides: "The board shall have power to adopt rules to govern its proceedings and to regulate the mode and manner of all investigations," *etc.* In the absence of any specific declaration creating the office of chairman and in the absence of any independent public functions or powers attached to the position, this provision is peculiarly significant. The legislature recognized the fact that in the orderly proceedings of the board there should be one member designated to preside over its deliberations, put all questions, and declare the will of the majority; in other words, to be the mouthpiece of the board, its agent and servant, but without authority or power independently of his authority as one member of the board and with such other power and authority only as the board might confer by appropriate rules and regu-

lations or in the absence of any rule upon the subject, then with such authority as accords with the spirit of parliamentary procedure and meets the approval of a majority of the board. No mention is made of the term for which the chairman shall hold the position. The legislature recognized further that the chairman would be selected by the members only because of their confidence in him; that the harmony and efficiency of the board would continue only so long as that confidence continued; and that whenever for any cause, or without cause, the chairman forfeits or otherwise loses that confidence upon the strength of which he was selected, the majority would have the authority to remove him and select a successor. That the legislature thus treated the chairmanship as a merely honorary position, the occupant of which is subject to control by the majority, holds the position at the will of the majority, performs, without compensation, whatever duties are assigned to him by the majority, and is without public power and authority independently of his office as a member of the board, is fairly conclusive evidence that it was not the intention of the legislature to create an independent public office.

Our conclusion is that the chairmanship of the board of railroad commissioners is not a public office, and therefore this proceeding cannot be maintained.

This demurrer is sustained and the complaint is dismissed.

Dismissed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

**CANYON CREEK ELEVATOR & MILLING CO.,
RESPONDENT, v. ALLISON, APPELLANT.**

(No. 3,738.)

(Argued March 21, 1917. Reargued and resubmitted April 24, 1917.
Decided May 31, 1917.)

[165 Pac. 753.]

***Corporations — Stock Subscriptions — Conditions Precedent —
Breach of Condition—Waiver—Withdrawal of Subscription
—Notice.***

Corporations—Stock Subscriptions—Conditions Precedent.

1. A stock subscription agreement, providing that, if a committee appointed from "our number" reported unfavorably on the acquisition of a milling plant, the subscription might be declared void, contemplated as a condition precedent that the committee was to be appointed by all the subscribers.

Same—Unconditional Subscription—Rights of Subscriber.

2. Ordinarily an unconditional stock subscription is a continuing offer until the proposed corporation is formed, and until that time it may be withdrawn at the subscriber's option.

Same—Conditional Subscription.

3. Where a stock subscription agreement contains a condition precedent, the condition must be fulfilled, or the agreement is not binding, although the corporation is formed.

[As to conditional subscriptions for stock in the corporation, see note in *Ann. Cas.* 1913C, 421.]

Same—Conditional Subscription—Breach of Condition.

4. Where a stock subscription agreement provided that if a committee, appointed from the subscribers, should report unfavorably on a certain plant, the subscriber might withdraw, evidence that a self-constituted committee inspected and reported favorably on such plant did not make the subscription contract binding.

Same—Waiver of Condition.

5. A stock subscription provision, that it might be declared void if a committee selected by the subscribers should report unfavorably on a certain plant, was not waived by a subscriber, who, knowing that a self-constituted group of subscribers had inspected and reported favorably, did not attend their meetings or ratify their action.

Same—Withdrawal of Subscription—Notice.

6. Defendant in an action to collect a stock subscription made under the condition precedent mentioned above, which remained unfulfilled, was not obliged to give notice of his withdrawal, although the corporation was thereafter fully organized; having, however, given oral notice of his intention to withdraw, it was sufficient.

Appeal from District Court, Yellowstone County; Geo. W. Pierson, Judge.

ACTION by the Canyon Creek Elevator & Milling Company against W. A. Allison. Judgment for plaintiff, and defendant appeals from it and an order overruling his motion for a new trial. Reversed and remanded, with directions.

Mr. F. B. Reynolds, for Appellant, submitted a brief and one in reply to that of Respondent, and argued the cause orally.

The more modern doctrine gives the subscriber who has been induced to make his subscription by reason of fraudulent representations of a promoter the same right to rescind that he would have if such fraudulent representations, so inducing the subscription, had been made by an agent of the corporation after its organization, upon the theory that the corporation cannot retain the benefits of the subscription without assuming its burdens, and that if the subscription was secured by fraud, and the corporation accepts the subscription and creditors' rights have not intervened, it takes it subject to the right of a subscriber to rescind. (1 Thompson on Corporations, secs. 708, 727.) False representations by the promoter constitute such a fraud on subscribers as authorizes a rescission of the subscription contract. (*Bohn v. Burton-Lingo Co.* (Tex. Civ.), 175 S. W. 173; *Luetzke v. Roberts*, 130 Wis. 97, 109 N. W. 949; *Tinker v. Kier*, 195 Mo. 183, 94 S. W. 501; *Manning v. Berdan*, 135 Fed. 159; *Second Nat. Bank v. Greenville S. etc. Co.*, 23 Ohio C. C. 274; *West End Real Estate Co. v. Nash*, 51 W. Va. 341, 41 S. E. 182; *McDermott v. Harrison*, 56 Hun, 640, 9 N. Y. Supp. 184; *Barcus v. Gates*, 89 Fed. 783, 32 C. C. A. 337.) A promoter is an agent of the corporation being promoted. (*Bosher v. Richmond & H. Land Co.*, 89 Va. 455, 37 Am. St. Rep. 879, 16 S. E. 360; *Virginia Land Co. v. Haupt*, 90 Va. 533, 44 Am. St. Rep. 939, 19 S. E. 168.) "The election to rescind may be by express words or by acts evidencing an intention to treat the contract as not binding." (9 Cyc. 435.)

A subscriber to the capital stock of a corporation about to be organized has the absolute right to participate in the organ-

ization, and that right is in effect a condition precedent to the enforcement of the subscription contract.

In this case the defendant, and, in fact, a majority of the subscribers, not only did not participate in the organization of the plaintiff corporation, but they had no notice of the organization meeting, and did not authorize anyone to act for them. Under these circumstances, the stockholders of the plaintiff corporation are only those who executed the articles of incorporation, and those who, after the execution of the articles of incorporation, ratified the incorporation and recognized themselves as stockholders thereof. (1 Thompson on Corporations, sec. 512; *Harrison Nat. Bank v. Votaw*, 51 Kan. 362, 32 Pac. 1111; *Bullock v. Falmouth etc. Co.*, 85 Ky. 184, 3 S. W. 129; *Nickum v. Burckhardt*, 30 Or. 464, 60 Am. St. Rep. 822, 47 Pac. 788, 48 Pac. 474; *Baltimore City Pass. Ry. Co. v. Hambleton*, 77 Md. 341, 26 Atl. 279; *De Giverville Land Co. v. Thompson*, 190 Mo. App. 682, 176 S. W. 409; *St. Paul etc. R. Co. v. Robbins*, 23 Minn. 439.)

A subscription to stock on a condition precedent does not render a subscriber a stockholder until the condition is performed. (*Martin v. Pensacola etc. R. Co.*, 8 Fla. 370, 73 Am. Dec. 713; *Midland City Hotel Co. v. Gibson*, 11 Ga. App. 829, 76 S. E. 600; *Chase v. Sycamore etc. R. Co.*, 38 Ill. 215; *Parker v. Thomas*, 19 Ind. 213, 81 Am. Dec. 385; *Burlington etc. R. Co. v. Boestler*, 15 Iowa, 555; *Belfast etc. Ry. Co. v. Moore*, 60 Me. 561; *Morrow v. Nashville Iron etc. Co.*, 87 Tenn. 262, 10 Am. St. Rep. 658, 3 L. R. A. 37, 10 S. W. 495; 10 Cyc. 412, 418; 1 Thompson on Corporations, sec. 604.)

So-called subscriptions to the capital stock of a corporation not yet formed are merely offers to subscribe. (*Wright Bros. v. Merchants & Planters' Packet Co.*, 104 Miss. 507, Ann. Cas. 1915C, 1111, 61 South. 550; *Bryant's Pond Steam Mill Co. v. Felt*, 87 Me. 234, 47 Am. St. Rep. 323, 33 L. R. A. 593, 32 Atl. 888; *Planters & Merchants' Ind. Packet Co. v. Webb*, 156 Ala. 551, 16 Ann. Cas. 529, 46 South. 977, 978; *Vermillion Sugar Co. v. Vallee*, 134 La. 661, 64 South. 670; *Hudson Real Estate*

Co. v. Tower, 156 Mass. 82, 32 Am. St. Rep. 434, 30 N. E. 465; *Midland City Hotel v. Gibson*, 11 Ga. App. 829, 76 S. E. 600; *Muncy Traction Eng. Co. v. Green*, 143 Pa. 269, 13 Atl. 747; Clark & Marshall on Private Corporations, sec. 451; 1 Thompson on Corporations, 2d ed., secs. 510-519, 543.) Like any offer, such an offer may be withdrawn at any time before organization of the corporation by giving notice of withdrawal. (See cases cited above, and Revised Codes, sec. 4992; *Auburn Bolt & Nut Wks. v. Shultz*, 143 Pa. 256, 22 Atl. 904; *Plank's Tavern Co. v. Burkhard*, 87 Mich. 182, 49 N. W. 562; *Patty v. Hillsboro Roller Mill Co.*, 4 Tex. Civ. 224, 23 S. W. 336.) Notice of withdrawal may be given to another subscriber prominent in the enterprise or who is in charge of subscription paper. (*Planters & Merchants' Ind. Packet Co. v. Webb*, 156 Ala. 551, 16 Ann. Cas. 529, 46 South. 977; *Hudson Real Estate Co. v. Tower*, 161 Mass. 10, 42 Am. St. Rep. 379, 36 N. E. 680, 681.)

Messrs. Johnston & Coleman, for Respondent, submitted a brief, *Mr. W. M. Johnston* argued the cause orally.

We are willing to admit that a corporation cannot claim or retain the benefit of a subscription which has been obtained through the fraud of its agents. In answer to the contention of counsel on this point, it is sufficient to say that neither fraudulent misrepresentations nor concealment is pleaded. The representations as to the proposed form of incorporation and the proposed location of the mill were as to neither past nor existing facts, and therefore, in order to constitute actionable fraud or deceit, must have been made as promises, which must have been made without any intention of being kept. (*Smith v. Parker*, 148 Ind. 127, 45 N. E. 770; *Sayer v. Harker*, 113 Iowa, 584, 85 N. W. 786; sec. 4978, subd. 4, sec. 5073, subd. 4, Rev. Codes.) There is no allegation of fraud. It is true that the answer alleges that these representations were false; but, as is pointed out in the following decisions, the allegation that the representations were false simply amounted to an allegation that they were untrue. (*York v. Steward*, 21 Mont. 515, 43

L. R. A. 125, 55 Pac. 29; *Holst v. Stewart*, 154 Mass. 445, 28 N. E. 574; *Northwestern S. S. Co. v. Dexter, Horton & Co.*, 29 Wash. 565, 70 Pac. 59; *Colorado Springs Co. v. Wight*, 44 Colo. 179, 16 Ann. Cas. 644, 96 Pac. 820; *Graves v. Horton*, 132 Ga. 786, 26 L. R. A. (n. s.) 545, 65 S. E. 112; *Ahern v. Hindman*, 101 Minn. 34, 111 N. W. 734; *Collins v. Gifford*, 203 N. Y. 465, Ann. Cas. 1913A, 969, 38 L. R. A. (n. s.) 202, 96 N. E. 721; *Kilpatrick v. Miller*, 55 Colo. 419, 135 Pac. 780; *Wheelright v. Vanderbilt*, 69 Or. 326, 138 Pac. 857.) Furthermore, there is no allegation in this portion of the answer from which even an inference can be drawn that defendant was misled to his prejudice or damage. (*American Building & Loan Assn. v. Eble*, 48 Neb. 573, 67 N. W. 501; *Power & Bro. v. Turner*, 37 Mont. 521, 97 Pac. 950; *Robertson v. Parks*, 76 Md. 118, 24 Atl. 411.)

The final contention of appellant is that the complaint fails to state a cause of action for two reasons: first, because there is no sufficient allegation of nonpayment, and, secondly, because there is no affirmative allegation of the performance of the condition precedent, to-wit, the appointment of a committee to investigate the mill at Absarokee, and the favorable report by such committee. As to the first of these contentions, we would call the court's attention to the fact that, so far as appears from the opinions in the cases of *State v. Lagoni*, 30 Mont. 472, 76 Pac. 1044, *Bebee v. Jackson*, 32 Mont. 217, 79 Pac. 1051, and *Van Horn v. Holt*, 30 Mont. 69, 75 Pac. 680, there is an absolute failure to make any allegation whatever as to nonpayment.

In the case of *Yancey v. Northern Pac. Ry. Co.*, 42 Mont. 342, 112 Pac. 533, it appears that there was a total failure to prove nonpayment, or refusal of payment, and the court will note that that was a case where the decision of the lower court was affirmed.

The case was tried throughout on the theory that defendant had failed and refused at all times to pay the subscription, by reason of the alleged misrepresentations, and it was on this theory that it was submitted to the court. "In an action by a

corporation on a stock subscription, an allegation that plaintiff demanded payment on a certain day, with which demand defendants refused to comply, was sufficient after verdict, as an allegation that the subscription was unpaid." (*Beckner v. Riverside etc. Co.*, 65 Ind. 468; *A. Widemann Co. v. Digges*, 21 Cal. App. 342, 131 Pac. 882; *Penrose v. Winter*, 135 Cal. 289, 67 Pac. 772; *Merrill v. Pacific Transfer Co.*, 131 Cal. 582, 63 Pac. 915; *Christiansen v. Aldrich*, 30 Mont. 446, 76 Pac. 1007; *Creecy v. Joy*, 40 Or. 28, 66 Pac. 295; *Lynch v. Bechtel*, 19 Mont. 548, 48 Pac. 1112; *Harmon v. Fox*, 31 Mont. 324, 78 Pac. 517; *Crowder v. McDonnell*, 21 Mont. 367, 54 Pac. 43.) As to the second of the contentions, the allegation follows the words of the contract. Defendant affirmatively sets up the nonperformance of this condition. Evidence as to this matter was admitted without objection.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action by plaintiff corporation to recover of the defendant \$100, the par value of one share of its capital stock, upon a subscription contract therefor. The contract is as follows:

"September 18, 1913.

"Whereas, we, the undersigned, desire to secure and establish a flour mill at Yegen, Mont., for the purpose of doing custom and general mill work and the handling of all kinds of grain; and whereas, the Northwestern Mill Construction Company proposes to erect such a plant at Yegen, Mont.: Now, therefore, we, the undersigned, do hereby agree with each other and with the said Northwestern Mill Construction Company that we will purchase from a company, organized for the purpose of purchasing from the Northwestern Mill Construction Company such a plant, the number of shares set opposite our names. The shares to be \$100 each. It being an express condition of this subscription that, if sufficient subscribers are not obtained within sixty days from the date hereof for the purchase of such a plant, or if a committee appointed from our number to in-

spect such a plant in operation shall report unfavorably, then these subscriptions may be, at our option, declared null and void; otherwise, to be in full force and effect."

The complaint alleges that on or about the date of the contract defendant subscribed for one share of the capital stock of the plaintiff upon the conditions named. It then alleges that all the conditions of the contract had been fulfilled, and that the stock of the plaintiff was issued to each of the subscribers in the amount subscribed by him; that one share was issued and tendered to the defendant, but that he refused to accept and pay for the same. Judgment is demanded for the amount of the subscription, with interest and costs. The answer by counter-averment denies that the committee mentioned in the contract was appointed or made any report. It admits all the other allegations of the complaint and alleges three separate affirmative defenses. At the trial the second one of these was abandoned. The others may be briefly epitomized as follows: (1) That the defendant signed the subscription contract at the solicitation of one Frank Sanderson; that, as an inducement to him to subscribe, Sanderson made certain representations to him as to the kind and character of the corporation to be formed, the location of the milling plant, and the profits such a plant would yield; and that defendant believed such representations and relied upon them as true, whereas they were false; (2) that it was a condition precedent that the committee provided for in the subscription contract should be appointed and should make report before the subscription should become effective; that no such committee was ever appointed; and that for this reason defendant, on December 6, 1913, notified the secretary of plaintiff that his subscription was null and void, and that he would not pay it. The reply joins issue upon these defenses. At the opening of the trial the court held that, upon the issues as made, the burden was upon the defendant. Upon objection by counsel for plaintiff, it excluded all the evidence tendered by defendant in support of the first defense. After the evidence was submitted in support of the third de-

fense, the court on motion directed a verdict for the plaintiff. The defendant has appealed from the judgment and an order denying him a new trial.

Counsel have devoted much space in their briefs to a discussion of the questions whether the complaint states a cause of action, whether the allegations in the first special defense disclose a case of fraud by Sanderson, the solicitor of the subscription, and whether the court properly ruled that the burden was upon the defendant. It is not necessary to consider and determine these questions, because under the evidence submitted in support of the third defense, which presents no substantial conflict, the defendant, we think, was clearly entitled to a verdict and judgment.

The contract does not expressly provide that the two conditions therein named are precedent. The conclusion cannot be avoided, however, that each subscriber, when he signed it, understood that he had reserved to himself the option to withdraw his subscription: First, if the amounts subscribed within sixty days from September 18 were not sufficient to make the proposed purchase; and, second, if a committee appointed from the number of subscribers made an unfavorable report after conducting the proposed investigation. It is clear, also, that they understood that the power to appoint the committee resided in the subscribers, for it was to be appointed from "our number"—language which, from the fact that it included all subscribers, cannot be construed to mean anything other than that the inspection was to be made by authority of all, and for the benefit of all. It may be assumed that those who were engaged in promoting the enterprise were impliedly authorized to take the lead in calling the subscribers together and ascertaining their wishes; but the right to select those whose opinion was to have significance as a determinating factor in their subsequent conduct was vested in the common body. The purpose to be served in inserting this provision evidently was that those subscribers who had not practical experience in connection with such enterprises might have the benefit of the judgment of those

of their number whom they deemed qualified to judge of the feasibility and prospective success of the one to be established at Yegen, and therefore whether the proposed investment would probably prove profitable. It was clearly not contemplated that any number of the subscribers less than the whole should select a committee whose judgment should conclude all. In order to reach the desired result, therefore, while it was not necessary that all should take part in selecting the committee, it was necessary that whatever form the proceeding assumed, all were to have an opportunity to take part.

Mr. Thompson, in his work on Corporations, speaking of these subscription contracts, says: "It is not necessary that a condition precedent be expressly stated as such; courts would scarcely require subscribers to say in express language that their subscriptions are made on condition that the corporation shall first perform some particular thing; on the contrary, mere recitals in the contract of subscription are frequently regarded as implied conditions." (Sec. 599.)

In 10 Cyc., at page 412, we find this statement of the rule: "A man cannot be forced into a contract which he does not choose to enter into. If, therefore, a man subscribes for shares in a corporation upon a condition which is lawful, and which consequently may be performed, unless that condition is performed, or its performance is waived by him, he cannot be held to make good his subscription." Again, on page 418, this statement is found: "If the condition is expressed on the face of the subscription agreement, and is valid under rules and theories already discussed, the obligation of the subscriber does not become binding until the condition has been performed by the corporation or waived by the subscriber; until that time he cannot be held to the liabilities of a shareholder. It is scarcely necessary to suggest that the corporation cannot elect to treat as unconditional a subscription which has been made upon a valid and expressed condition."

The general rule is that an unconditional subscription is a [2, 3] continuing offer until the proposed corporation is

formed. It becomes irrevocable only when it has been acted upon. This, however, is necessary in order to bind the subscriber, and until the corporation is formed, he is at liberty at any time to withdraw. (*Deschamps v. Loiselle*, 50 Mont. 565, 148 Pac. 335.) When the subscription, as here, is made to take effect upon the fulfillment of a condition precedent, the condition must be fulfilled, or the offer is never binding, even though the corporation has been formed. On this subject Mr. Thompson says: "Many cases have held that a strict performance of the condition is necessary in order to entitle the corporation to recover. These holdings are governed largely by the particular wording of the contract of subscription. And where there is nothing to show a contrary intention, and the language of the subscription is plain, there is no reason why a strict compliance should not be required. This naturally follows as a minor proposition from the major premise, that a subscriber may attach any condition to his subscription which he sees fit, under the limitation that it is not contrary to law or against public policy, and is within the power of the corporation to perform. For a court to say that a subscriber might thus attach a whimsical condition to his subscription, and then to hold that there need not be a strict compliance on the part of the corporation, would be illogical and inconsistent." (Sec. 604.) This rule is supported by the following cases: *Martin v. Pensacola etc. Ry. Co.*, 8 Fla. 370, 73 Am. Dec. 713; *Midland City Hotel Co. v. Gibson*, 11 Ga. App. 829, 76 S. E. 600; *Chase v. Sycamore etc. Ry. Co.*, 38 Ill. 215; *Cravens v. Eagle Cotton Mills Co.*, 120 Ind. 6, 16 Am. St. Rep. 298, 21 N. E. 981; *Belfast etc. Ry. Co. v. Moore*, 60 Me. 561; *Morrow v. Nashville Iron etc. Co.*, 87 Tenn. 262, 10 Am. St. Rep. 658, 3 L. R. A. 37, 10 S. W. 495.

The evidence discloses that no committee was ever appointed [4] by authority of the subscribers, or made report to them. At the time the subscriptions were solicited, it was understood by the subscribers that the committee to be appointed was to inspect a mill similar to that proposed, situated at Absarokee,

in Stillwater county, and make report accordingly. The only attempt to fulfill this condition was the following: Mr. Frank Sanderson, who solicited the subscriptions from the defendant and others, C. W. Sanderson, John Epperson, Roy Stebbins and J. M. Brannon, all being subscribers, agreed among themselves, at the instance of W. W. Clarke, himself a subscriber and also interested in some official capacity in the Northwestern Mill Construction Company, to go to Absarokee and inspect the mill at that place. Mr. Clarke proposed to pay the expenses of all who would go. The first five took the lead in effecting the organization; Frank Sanderson becoming its president and C. M. Sanderson its secretary. They called up some of the subscribers by telephone, including the defendant. Some of them had no notice of any kind. The defendant testified: "The evening before the committee went, Mr. Sanderson called me up and asked me if I would like to go to Absarokee. He didn't say the committee. I said it was impossible for me to go. I asked him who was going. He said: 'I don't know any more than I think Mr. Roy Stebbins and Mr. Sansome.'" He declined to go. Later a meeting of those who went to Absarokee and some of the other subscribers was held at a schoolhouse near Yegen, at which this self-constituted committee made a formal report. Frank Sanderson testified as to what took place at that time as follows: "After we made the trip, there was a meeting of the subscribers held. I don't know the date of the meeting. It was held at Canyon Creek schoolhouse at a called meeting. The meeting was called just among ourselves. Told everybody we saw, and called up some on the phone, *etc.*, that there would be such a meeting there, and this committee would report at that meeting. The committee reported at that meeting. The report was favorable." The defendant was informed of this meeting, but did not attend, and did not know what was done. Concerning it he testified: "Mr. Sanderson told me of a meeting to be held at the Canyon Creek schoolhouse, at which this committee that went to Absarokee was to report. That was to be on a Saturday evening." Some

of the subscribers did not become such until after these occurrences had taken place. On November 17 Mr. Stebbins, who was acting as "secretary," sent written notices to all the subscribers, addressing them as stockholders of the plaintiff, that their first meeting would be held at the store of C. M. Sanderson, at Yegen, on December 6, for the purpose of "adopting by-laws for the said company." He asked for the proxies of those who did not care to attend the meeting in person. Defendant did not attend, nor did he send his proxy. The preliminary steps were taken to effect the organization of plaintiff, by the execution of the articles of incorporation and the selection of officers. On the same day defendant notified Stebbins by telephone that he canceled his subscription on the ground of misrepresentation. Later, in a conversation with Stebbins, he told him he had withdrawn his subscription. With reference to what occurred he testified: "I called up Roy Stebbins, and told him to cancel my subscription because of misrepresentations. I told him the change of location [of the mill] was one. That is not the only one I mentioned. I stated it was a misrepresentation all through, for I understood we were to be called together as subscribers to select the committee. The substance of my conversation with Stebbins at that time was something to that effect. In the course of our conversation Mr. Stebbins said he wasn't satisfied with the action they had taken. He said: 'I, for one, would have rather that they had called the subscribers together before doing anything.' And the next time I saw Mr. Stebbins, he said to me, 'Did I really mean I was pulling out?' and I said I did." The organization was completed by the filing of the articles on December 17.

It may be conceded that, if the defendant had by word or act assented to or ratified the proceedings of the self-constituted [5] committee, as by attending the meeting at the schoolhouse to hear its report, or by attending the subsequent meeting at Sanderson's store, and taking part, without objection, in the organization of the company, he would properly be held to have waived the right to insist that he had not been given an oppor-

tunity to exercise his option to annul his subscription. He was not bound, at his peril, however, to object to the proceedings of a committee of which he had not been informed, and in the selection of which he had taken no part. He had a right to understand that Frank Sanderson, Stebbins, and others, who had assumed the leadership in forwarding the enterprise, would give him notice, so that he might take part in the selection of the committee by whose favorable judgment he was to become bound. He was not consulted as to the propriety of the selection of the self-constituted committee. The information he received was that there was a committee, with an opportunity extended to him to join it, if he desired to do so. He was not bound by its action, unless he chose to be; and as he said no word nor performed any act from which it might reasonably be inferred that he intended to acquiesce in the action of the committee, the fulfillment of the condition of the contract was not waived by him. Therefore, under the rule of the authorities cited, he was at liberty to recall his subscription and thus avoid liability to pay it. Otherwise, he became bound, notwithstanding he never had an opportunity to exercise his option.

The notice of withdrawal by defendant was given to Stebbins after the adjournment of the meeting of December 6, at which C. M. Sanderson was named secretary of the plaintiff. Inas-
[6] much as defendant never had an opportunity to exercise his option as contemplated in the contract, he was not under obligation to give notice to anyone, even though the corporation was thereafter fully organized. In any event, his notice to Stebbins was sufficient to indicate his purpose.

The judgment and order are reversed and the cause is remanded to the district court, with direction to enter judgment for the defendant.

Reversed and remanded.

MR. JUSTICE SANNER concurs.

MR. JUSTICE HOLLOWAY: I am unable to subscribe to the conclusion reached by the majority. Under the third de-

fense, defendant could avoid liability only in the event that the report of the committee was unfavorable. No such report was ever made. Though the committee which investigated the Absarokee plant was selected in the most informal manner, it nevertheless made an investigation and reported favorably. The defendant does not object to the personnel of the committee, does not contend that it was not fairly representative of the subscribers generally, and does not challenge the correctness of the report. If the report made truthfully stated the facts concerning the Absarokee plant, then defendant is not entitled to be heard to urge this defense, for, though an entirely different committee had been selected, and selected in the most solemn and formal manner imaginable, the report would necessarily have been the same.

Reduced to its ultimate analysis, then, defendant avoids responsibility solely on the ground that the committee was not selected in a formal manner. This he ought not to be permitted to do. Upon the theory of the case presented to the trial court, I think the correct conclusion was reached, and that the judgment should be affirmed.

MEMORANDA

OF

DECISIONS RENDERED WITHOUT EXTENDED, OPINIONS DURING THE PERIOD EMBRACED IN THIS VOLUME.

No. 3,955.—STATE *EX REL.* RUSSELL, RELATOR, *v.* DISTRICT COURT *ET AL.*, RESPONDENTS.

Original application for writ of *mandamus* directed to the District Court of the Fourth Judicial District, and R. Lee McCulloch, a Judge thereof.

Decided November 20, 1916.

PER CURIAM.—The motion to quash the alternative writ of mandate heretofore issued herein is, after due consideration, sustained and the proceeding dismissed.

Mr. Chas. A. Russell, for Relator.

Mr. Wm. T. Pigott and *Mr. Wade R. Parks*, for Respondents.

No. 3,864.—GEORGE JACK, APPELLANT, *v.* CHICAGO, MILWAUKEE & ST. PAUL RY. CO., RESPONDENT.

Appeal from District Court, Powell County; Geo. B. Winston, Judge.

Decided December 14, 1916.

PER CURIAM.—Respondent's motion to dismiss the appeal from the order denying plaintiff's motion for a new trial is this

day, after due consideration, sustained, and the appeal from said order is accordingly dismissed. It is further ordered (May 28, 1917) that the appeal from the judgment herein be, and the same is hereby, dismissed.

Mr. C. W. Keeley and Mr. S. P. Wilson, for Appellant.

Messrs. Scharnikow & Jordan, for Respondent.

No. 3,965.—STATE *EX REL.* MORGAN GRIFFITHS, APPELLANT, *v.* MAYOR AND COUNCIL OF CITY OF BUTTE, RESPONDENTS.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

Decided January 3, 1917.

PER CURIAM.—Appellant's motion for leave to dismiss the appeal herein without prejudice is this day granted, and the appeal is accordingly dismissed.

Mr. William E. Carroll, for Appellant.

Messrs. J. V. Dwyer, John A. Groeneveld and N. A. Rotering, for Respondents.

No. 3,997.—STATE *EX REL.* WM. L. WOOLRIDGE *ET AL.*, RELATORS, *v.* DISTRICT COURT *ET AL.*, RESPONDENTS.

Original application for writ of *certiorari* directed to the District Court of the Eighth Judicial District and H. H. Ewing, a Judge thereof.

Decided February 19, 1917.

PER CURIAM.—The application of relators herein for a writ of review is, after due consideration, by the court denied.

Mr. W. B. Sands, for Relators.

No. 3,896.—ALLING MER. & L. CO., RESPONDENT, v. E. E. SMILEY ET AL., APPELLANTS.

Appeal from District Court of Richland County; C. C. Hurley, Judge.

Decided March 19, 1917.

PER CURIAM.—Pursuant to motion of appellants, the appeal in this cause is hereby dismissed.

Mr. R. O. Lunke and *Mr. C. E. Collett*, for Appellants.

Mr. F. P. Leiper and *Mr. John Bird*, for Respondent.

No. 3,720.—HOMER G. MURPHY, RESPONDENT, v. ANNA E. NETT, APPELLANT.

Appeal from District Court, Lewis and Clark County.

Decided March 23, 1917.

PER CURIAM.—Pursuant to respondent's motion that the appeal herein be dismissed for failure to file brief, the appeal herein is dismissed.

Mr. W. D. Rankin, for Appellant.

Mr. H. G. McIntyre, for Respondent.

No. 4,027.—FLORA MEYER, RESPONDENT, *v.* MAX BLAU-STEIN, APPELLANT.

Appeal from District Court, Silver Bow County.

Decided April 19, 1917.

PER CURIAM.—Upon motion of respondent, the appeal herein is hereby dismissed for failure of appellant to file transcript in time.

Mr. James H. Baldwin, for Appellant.

Messrs. William & Henry Meyer, for Respondent.

No. 4,037.—STATE *EX REL.* W. B. SANDS *ET AL.*, RELATORS, *v.* DISTRICT COURT *ET AL.*, RESPONDENTS.

Original application for writ of review directed to the District Court of the Eighth Judicial District, in and for the County of Cascade, and H. H. Ewing, a Judge thereof.

Decided April 27, 1917.

PER CURIAM.—Relators' application for writ of *certiorari* herein is, after due consideration, denied.

Mr. W. B. Sands, for Relators.

No. 3,775.—ST. ANTHONY & DAKOTA ELEVATOR CO.,
RESPONDENT, v. EMERSON-BRANTINGHAM IMPE-
LEMENT CO., APPELLANT.

*'Appeal from District Court of the Twelfth Judicial District,
in and for the County of Hill; John W. Tattan, Judge.*

Decided May 28, 1917.

PER CURIAM.—Pursuant to motion of appellant, the appeal
herein is dismissed.

Mr. H. S. Kline, for Appellant.

Mr. O. B. Kotz, for Respondent.



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Of information, during trial,—see Criminal Law, 35.

APPEAL AND ERROR.

New Trial Order—Affirmance, When.

1. Where an order granting a new trial is general, it will be affirmed if substantial error occurred in respect to any of the grounds urged; it being presumed that the order was made because of such error.—Horsky v. McKennan, 50.

Briefs—Specification of Errors.

2. Where appellant's only contention was that the evidence in an equity case was insufficient to sustain the court's findings, his failure to comply with the court's rule requiring appellant's brief to

contain a specification of errors, *held* insufficient to command a dismissal of the appeal.—*Robitaille v. Boulet*, 66.

Equity Cases—Findings—Insufficient Evidence—Review.

3. The appellant in an equity case claiming that the evidence is insufficient to sustain the court's findings has the burden of showing that it preponderates against them.—*Robitaille v. Boulet*, 66.

Theory of Case—Federal Question.

4. The rule of practice that parties cannot on appeal change the theory on which the cause was tried in the lower court must give way where the theory entertained by court and parties on the trial of the cause had to do with a federal question theretofore adversely decided by the supreme court of the United States.—*Wall v. Northern Pacific Ry. Co.*, 81.

General Verdict—Conclusiveness.

5. Where an action against a railroad for injury to cattle while in transit was based on three different items of damage, and it is impossible to determine from the record what particular items were considered by the jury in returning a verdict in a lump sum, the supreme court cannot direct judgment awarding damages for any one of the items, and thus substitute its findings for those of the jury.—*Wall v. Northern Pacific Ry. Co.*, 81.

Evidence—Admissibility—Technical Error.

6. Technical error in the reception of evidence as to facts admitted does not command a reversal.—*Rea v. Alfalfa Products Co.*, 90.

Rebuttal—Evidence—Proper Rejection.

7. Rejection of testimony in rebuttal was not error where there was nothing to rebut.—*Rea v. Alfalfa Products Co.*, 90.

Instructions—Technical Error.

8. Where the question of the cancellation of a contract was not involved in an action for damages for its breach, the technical misuse of the term "cancellation" in an instruction was not sufficient to reverse the judgment where from the charge as a whole the jury must have understood that the term was used in the sense that defendants were not bound to continue after plaintiffs breached the contract by an unjustifiable failure to pay a previous monthly bill.—*Rea v. Alfalfa Products Co.*, 90.

Briefs—Transcript—Copies—Service—Technical Violation of Rule.

9. Technical noncompliance with the rule requiring copies of transcript and briefs to be served upon the attorney general in causes in which that officer must appear by virtue of his office, will not command reversal of an appeal where service of both had been made before submission of the cause and the state suffered no inconvenience because of the delinquency of opposing counsel.—*State ex rel. Fadness v. Eie*, 138.

Bill of Exceptions—Use on Appeal.

10. Under section 7112, Revised Codes, any bill of exceptions settled during trial pursuant to section 6787, Revised Codes, or after trial (sec. 6788), whether used on motion for a new trial or not, may be used on appeal from a final judgment.—*Ferrat v. Adamson*, 172.

***Obiter Dictum*—Definition.**

11. An *obiter dictum* is a gratuitous opinion which is binding upon no one.—*Ferrat v. Adamson*, 172.

Law of the Case.

12. To the extent that the facts presented upon the retrial of a cause were before the supreme court on a previous appeal, its decision then made was the law of the case, binding alike upon the trial and appellate courts.—*Walsh v. Hoskins*, 198.

Equity—Appeal—Findings—Power of Supreme Court.

13. In an equity suit in which the evidence is all before the supreme court, it may, under section 6253, Revised Codes, determine a fact on which the trial court failed to make a finding.—*Walsh v. Hoskins*, 198.

New Trial Order—Affirmance, When.

14. An order sustaining a motion for new trial general in terms will be approved if it can be justified upon any one of the several grounds upon which it is made.—*Reynolds v. Jones*, 251.

Same—Insufficiency of Evidence—Discretion.

15. Where abuse of discretion on the part of the district court in granting a new trial on the ground, among others, of insufficiency of the evidence to justify the verdict is not shown, it will stand affirmed. *Reynolds v. Jones*, 251.

Criminal Law—Information—Counts—Evidence—Right to Appeal.

16. Where defendant in a criminal prosecution made no attempt during the trial to have three of four counts of the information withdrawn from the consideration of the jury because unsupported by the evidence, he was not in a position on appeal to raise the question whether a general verdict of guilty can stand where only one of a number of counts has support in the evidence.—*State v. Reed*, 292.

Briefs—Rules—Specifications.

17. Unless appellant's brief presents alleged error in the admission of evidence, in the manner pointed out by subsection b, section 3, of Rule X, rules of the supreme court, it is not entitled to consideration.—*Petit v. Sinclier*, 317.

New Trial Order—General in Terms—Affirmance, When.

18. An order general in terms granting a motion for new trial will be affirmed if it can be justified upon any one of the statutory grounds assigned in the motion.—*Rhoades v. Ness*, 322.

Same—Conflict in Evidence—Affirmance.

19. Where the evidence is conflicting, the granting or refusal of a new trial is within the sound legal discretion of the trial court.—*Rhoades v. Ness*, 322; *Savage v. Boyce*, 470.

Conflict in Evidence—Verdict—Conclusiveness.

20. Where the jury finds a verdict on conflicting evidence, the supreme court will on appeal assume that the facts were as claimed by the prevailing party.—*Hanson Sheep Co. v. Farmers & Traders' State Bank*, 324.

Harmless Error—Cross-examination.

21. Technical error in permitting cross-examination of plaintiff as to matters about which he had not testified in chief is harmless, and therefore insufficient to work a reversal, where prejudice is not apparent or pointed out.—*Hanson Sheep Co. v. Farmers & Traders' State Bank*, 324.

Assigning Error for Party not Appealing.

22. Appellant (petitioner) in an election contest was not in a position to raise the point that, because the sureties on the bond required of him before instituting the proceeding were not given their day in court previous to granting his opponent attorneys' fees, the award was not warranted.—*Doty v. Reece*, 404.

Law of the Case.

23. Where, on a prior case, the facts pleaded by defendant were held sufficient to warrant reformation of the note sued on, such holding became the law of the case, binding, on a subsequent trial or appeal, both upon trial and supreme courts.—*Parchen v. Chessman*, 430.

Equity—Findings—Conclusiveness.

24. Unless a finding of the trial court in an equity case is opposed to the clear preponderance of the evidence, it will, on appeal, be accepted as proper.—*Loud v. Hanson*, 445.

Filing of Record—Dismissal.

25. Where the record on appeal from an order denying a new trial had been filed before a motion to dismiss was made, and notice of it given, because not filed with the clerk within sixty days after the appeal had been perfected, the motion will be denied.—*Huffine v. Lincoln*, 474.

Decisions of Other Courts—How to be Viewed.

26. Decisions of courts of other states are not binding upon the supreme court of this state; they are useful or persuasive, if the reasoning applied appeals to sound judgment.—*State ex rel. Ford v. Schofield*, 502.

Specifications of Error—Briefs.

27. Under paragraph X, subdivision b, of the Rules of the Supreme Court, where error in the admission or rejection of evidence is relied on by appellant, the full substance of the evidence must be quoted in his brief.—*Brockway v. Blair*, 531.

Instructions—Briefs.

28. Alleged error in instructions given or refused is not entitled to consideration on appeal, unless the instruction is set out in full in appellant's brief.—*Brockway v. Blair*, 531.

Equity—Complaint—Sufficiency.

29. Where the sufficiency of the complaint in an equity case was not tested by special demurrer, the only objection made to it being presented on the introduction of evidence, the supreme court on appeal will confine its inquiry to the question whether the pleading states sufficient facts to warrant the relief demanded.—*Buhler v. Loftus*, 546.

ARREST.

See Criminal Law, 1-8.

ASSIGNMENT.

Notice of attorney's lien—Assignee chargeable with,—see Attorney and Client, 7.

Of non-negotiable instrument—Effect,—see Negotiable Instruments, 4.

ATTACHMENT.**Affidavit—Insufficiency.**

1. A paper intended as an affidavit required as a prerequisite to the issuance of a writ of attachment, but not signed by an officer authorized to administer an oath, was insufficient on the face of it.—*Continental Oil Co. v. Jameson*, 466.

Motion to Dissolve—Affidavits Inadmissible.

2. Under section 6682, Revised Codes, affidavits tending to show that declarations contained in a purported affidavit were in fact sworn to, but that the notary public inadvertently omitted to sign it, though proper on motion to amend the writing, were inadmissible in opposition to a motion to discharge the attachment.—*Continental Oil Co. v. Jameson*, 466.

Security for Debt—Affidavit—Insufficiency.

3. Affidavit on attachment stating that payment of the debt due "is not secured," held insufficient under section 6657, Revised Codes, the statement being referable to the date upon which the writing was pre-

pared, and pregnant with the admission that it had been secured by mortgage or lien prior thereto.—*Continental Oil Co. v. Jameson*, 466.

Substantial Compliance With Statute Necessary.

4. Substantial compliance with the requirements of the statute is necessary to authorize the issuance of a valid writ of attachment.—*Continental Oil Co. v. Jameson*, 466.

ATTEMPTS.

To commit murder,—see *Criminal Law*, 44.

ATTORNEY AND CLIENT.

Attorney's fee in election contest,—see *Elections*, 6–9.

Contract between litigant and layman to procure testimony,—see *Contracts*, 13, 14.

Liability of Executors and Administrators.

1. As a general rule, the personal representative of an estate is individually liable for services performed by attorneys for its benefit, at his special instance and request.—*Wight v. Dolenty*, 168.

Fees—Liability of Estate—Evidence—Insufficiency.

2. Conceding (but not deciding) that by special agreement between an attorney and the personal representative of an estate, individual liability of the latter may be obviated, *held* that in an action to recover attorney's fees from the executrix of an estate, the evidence was insufficient to show such an agreement.—*Wight v. Dolenty*, 168.

Attorney's Lien—Notice.

3. Section 6422, Revised Codes, giving an attorney a lien upon his client's cause of action, is notice to the world; hence the attorney is not required to give notice.—*Walsh v. Hoskins*, 198.

Settlement—Complaint—Findings—Immateriality.

4. Since, under section 6422, Revised Codes, an attorney's lien cannot be affected by any settlement between the parties before or after judgment, a finding in an action by an attorney on such a lien, that defendant had no intention to defeat the lien by making final payment, under a contract of sale in a bank other than the one fixed therein, was immaterial, as was also an allegation in the complaint that they had such intention.—*Walsh v. Hoskins*, 198.

Attorney's Lien—Assertion, When.

5. An attorney may, independently of his client, assert his lien prior to judgment or settlement.—*Walsh v. Hoskins*, 198.

Assertion of Lien—Laches.

6. An attorney who acted promptly in asserting his lien upon discovery of a violation of a settlement agreement relative to litigation conducted by him, under the terms of which all moneys were to be and were paid into a home bank to the credit of his clients, except the last installment which, contrary to the agreement, was placed in a bank outside the state, was not chargeable with laches.—*Walsh v. Hoskins*, 198.

Settlement—Assignees—Notice of Lien.

7. Though, as between attorney and client, the latter controls the course of litigation, including its settlement, the parties making the settlement, as well as their assignees, are chargeable with notice of the former's statutory lien.—*Walsh v. Hoskins*, 198.

Executors and Administrators—Employment of Counsel.

8. The employment of counsel by an administrator is a personal matter, and creates no relation between the attorney and the estate.—*State ex rel. Cohen v. District Court*, 210.

Same—Attorneys' Fees—Recovery Back—Probate Courts—Jurisdiction.

9. Where an administrator expends funds of the estate in his charge for the employment of counsel, and the probate court refuses to make allowance therefor, he or his bond must make good; but the estate cannot demand of, nor can the court while sitting in probate order, the attorney to return such funds without a jury trial of the issues presented in a proper civil action, upon the necessity and value of the services.—State ex rel. Cohen v. District Court, 210.

Same.

10. Funds of an estate expended by the administrator for attorneys' fees are not recoverable on the theory that the attorney—a stranger—has property of the estate in his possession for which he may be called to account under sections 7505 and 7506, Revised Codes; the jurisdiction of the court sitting in probate under these provisions extending no further than to require the accused to appear and submit to an examination, it having no power to adjudge rights which may be asserted or involved.—State ex rel. Cohen v. District Court, 210.

AUTOMOBILES.

Law of the road,—see Personal Injuries, 21, 22.

BANKS AND BANKING.

Pass-book—Effect, When Accepted as Correct.

1. The balance disclosed by a pass-book when accepted as correct, becomes an account stated between the bank issuing it and the depositor, which, until changed by other dealings between them, fixes the amount due the latter, unless fraud, mistake or error intervened in ascertaining it.—Hanson Sheep Co. v. Bank, 324.

Corporations—Bank Deposit—Authority to Apply.

2. Where the president of a corporation, the stock of which, with the exception of a small portion nominally held by his wife and a brother, was owned by himself, used the corporate name as a cloak under which to conduct his own business, a bank familiar with his manner of conducting the affairs of the ostensible corporation was justified in acting upon his oral direction and applying a deposit made in the corporate name to the payment of notes given it by him to secure private indebtedness.—Hanson Sheep Co. v. Bank, 324.

BILL OF EXCEPTIONS.

Use on appeal,—see Appeal and Error, 10.

BILLS AND NOTES.

See Negotiable Instruments.

BILLS OF LADING.

See Railroads, 1.

BONDS.

Refunding bonds—Issuance of,—see Counties, 9–11.

See, also, Official Bonds.

BOYCOTT.

See Labor Unions, 1–5.

BRANDS.

See Evidence, 13.

BRIDGES.

Not county property,—see Counties, 4.

BRIEFS.

Service of—Technical violation of rule,—see Appeal and Error, 9.

Specification of errors,—see Appeal and Error, 2, 17, 27, 28.

BROKERS.

Commissions—Correct Instruction.

1. In an action to recover commissions on sales of automobiles, under a contract the terms of which permitted plaintiff to call for assistance from defendant if necessary to complete a sale, the court correctly instructed the jury that the former was entitled to his commissions if his endeavors were the moving cause or "instrumental" in making the sales, even though he was assisted by one of defendant's demonstrators in finally consummating them.—*Brockway v. Blair*, 531.

BULK SALES LAW.

When not Applicable.

1. *Held*, that pool-tables, cues and billiard-balls kept for use in a poolroom are not articles of merchandise which the Bulk Sales Law (Rev. Codes, secs. 6131-6135) was designed to cover, that Act having reference to such goods only as the merchant keeps for sale in the ordinary course of his business.—*Ferrat v. Adamson*, 172.

BURDEN OF PROOF.

Estates of Deceased Persons—Liability for Loss.

1. The burden of showing that an estate has apparently suffered loss through the neglect of an executor or administrator is upon the heir or creditor who seeks to charge him with the loss.—*In re Dolenty's Estate*, 33.

Arrest Without Warrant—Resisting Officer.

2. In a prosecution for resisting an officer attempting to make an arrest without a warrant, the existence of any one of the emergencies pointed out by section 9057, Revised Codes, justifying the arrest, must be clearly established; proof of a mere belief in its existence, though entertained in the utmost good faith, being insufficient.—*State v. Bradshaw*, 96.

Injunction *Pendente Lite*.

3. To secure an injunction *pendente lite* the party applying for it has the burden of establishing a *prima facie* right to the relief.—*Postal Telegraph-Cable Co. v. Nolan*, 129.

Personal Injuries—Master and Servant—Assumption of Risk.

4. Where plaintiff's own evidence in a personal injury action furnishes the basis for no other inference than that he assumed the risk, he cannot recover unless he exculpates himself, and this whether the defense is pleaded or not.—*Stevens v. Henningsen Produce Co.*, 306.

Corporations—Officers and Directors.

5. When it appears that the president or a director of a corporation has been dealing with it, the burden is upon him to show that his dealings have been fair and honest.—*Hanson Sheep Co. v. Bank*, 324.

Receivers—Appointment—Discretion.

6. An application for the appointment of a receiver is addressed to the sound legal discretion of the trial court; the burden of showing abuse of such discretion being upon appellant.—*Montana Ranches Co. v. Dolan*, 397.

Same—Necessity of Appointment.

7. Since the remedy by receivership is one never to be allowed except upon a showing of necessity therefor, appellant had the burden of showing such necessity.—*Montana Ranches Co. v. Dolan*, 397.

Prohibition.

8. The applicant for a writ of prohibition assumes the burden of showing that the lower court is acting without or in excess of jurisdiction, and that no plain, speedy and adequate remedy in the ordinary course of law exists.—*State ex rel. Myersick v. District Court*, 450.

Deeds—Mortgages.

9. The burden of showing that a deed absolute was intended as a mortgage, *held* to have been upon the grantor.—*Elling v. Fine*, 481.

CANCELLATION OF INSTRUMENTS.**Fraud—Complaint.**

1. In order to make out a case of fraud, the complaint must allege that the defendant made a representation intending that the plaintiff should act upon it; that the representation was false; that plaintiff believed it, and that he acted upon it to his damage.—*Buhler v. Loftus*, 546.

Expression of Opinion—Future Events—Complaints.

2. Generally, a mere expression of opinion, however erroneous, a misrepresentation as to what will be done in the future, or a statement of intention, will not warrant cancellation of a contract for fraud.—*Buhler v. Loftus*, 546.

Fraud.

3. A misrepresentation with reference to the future, but so related to present conditions that its affirmation will constitute fraud, is sufficient cause for cancellation of the resultant contract.—*Buhler v. Loftus*, 546.

Same—Complaint.

4. False representation that an investment company would be ready for business within two months, made to induce the sale of stock was a fraud, within the meaning of section 4978, Revised Codes.—*Buhler v. Loftus*, 546.

Same—Complaint—Remedy at Law—Pleading Conclusions.

5. An allegation in plaintiff's complaint specifically stating that he had no adequate remedy at law, *held* unnecessary; the question whether the case presented was one of equitable cognizance depending upon the averments upon which demand for relief was predicated, not upon the conclusion of law drawn from them by the pleader.—*Buhler v. Loftus*, 546.

Same—Offer to Return Consideration—Complaint.

6. Where the complaint seeking cancellation of a mortgage and notes offered to return the stock in purchase of which they were given, it was a sufficient allegation of an offer to restore the consideration.—*Buhler v. Loftus*, 546.

Same—Findings—Presumptions—Incompetent Evidence.

7. The presumption obtains that the trial court in making its findings in an equity case, after argument by counsel, considered only so much of the evidence as was competent and substantially material, rejecting such as ought to have been rejected.—*Buhler v. Loftus*, 546.

CERTIORARI.**Public Boards—Error Within Jurisdiction.**

1. Error committed by a board of commissioners appointed to adjust the indebtedness between an old and a newly created county—a func-

tion judicial in character—in taking bridges into consideration as county property, constitutes error within jurisdiction not correctible by *certiorari*, even though provision is not made for an appeal or some other mode of review of the board's action.—State ex rel. Furnish v. Mullendore, 109.

Office of Writ.

2. The office of the writ of *certiorari* is to annul, modify, or affirm the action of an inferior tribunal; it cannot supply defects or restrain excesses.—State ex rel. Furnish v. Mullendore, 109.

Moot Questions—Judgment—Effect.

3. The judgment of the district court in modifying on *certiorari* the findings of a board of commissioners intrusted with the adjustment of the indebtedness between an old and a new county, when the writ did not lie, amounted to a judgment upon a moot question, and therefore was not effective for any purpose.—State ex rel. Furnish v. Mullendore, 109.

CHAMPERTY AND MAINTENANCE.

Contract to procure testimony,—see Contracts, 13, 14.

CHANGE OF VENUE.

See Mandamus, 7.

CHATTEL MORTGAGES.

See Mortgages, 1-3.

CITIES AND TOWNS.

Specific Performance — Municipal Waterworks Contract — Renewal Agreement.

1. *Held*, that a contract between a city and a water company under the terms of which the city bound itself to either purchase the company's plant at the end of twenty years, or renew the contract for twenty years longer "upon such terms as are mutually agreed upon at that time," was not specifically enforceable, inasmuch as courts cannot compel parties to agree or make an agreement for them.—Livingston Waterworks v. City of Livingston, 1.

Same—Public Service Commission—Fixing Rates.

2. Since the contract *supra*, sought to be specifically enforced was the contract originally in contemplation of the parties, at which time the Public Service Commission, with power to fix water rates, had not been created, the contention that, in view of such power, the clause calling for a renewal of the contract amounts to an agreement to renew at such rates as the commission may prescribe, and is therefore enforceable under paragraph 2, *supra*, *held* without merit.—Livingston Waterworks v. City of Livingston, 1.

Same—Renewal Agreement—Estoppel.

3. Where the renewal of a twenty year water contract between a city and a water company became the subject of controversy immediately after its expiration, the company was not in position to assert estoppel because misled into making costly expenditures on the plant by the conduct of the city.—Livingston Waterworks v. City of Livingston, 1.

Indebtedness—Taxpayer's Suit—Injunction.

4. The interest a taxpayer has in a proposed city bond issue is sufficient to entitle him to bring suit to enjoin the expenditure of public

funds if the city threatens to make unlawful use of them.—*McClintock v. City of Great Falls*, 221.

Expenditures—What Constitutes Cash Transaction.

5. Where a city has on hand funds available for a contemplated improvement in amount sufficient to discharge its obligations under contracts necessary to be entered into for that purpose as they mature, no indebtedness is contracted—it is a cash transaction.—*McClintock v. City of Great Falls*, 221.

Procuring Water Supply—Additional Indebtedness.

6. A city had a water supply sufficient in quantity but unsuitable as to quality, and therefore issued bonds with the sanction of the electors, and sold the same for the purpose of procuring funds to install a filtration plant. The constitutional three per cent limit of indebtedness had theretofore been reached. *Held*, in a suit by a taxpayer for an injunction, that the contemplated expenditure was properly justifiable as one “to procure a water supply,” within the meaning of section 6, Article XIII, of the Constitution, permitting indebtedness for such purpose in addition to the three per cent limit.—*McClintock v. City of Great Falls*, 221.

Powers—Constitution.

7. A city is a creature of statute, and, in the absence of constitutional limitations, the legislature may prescribe for it such powers and privileges as it deems best.—*McClintock v. City of Great Falls*, 221.

Procuring Water Supply—Additional Indebtedness—Constitution.

8. The only limitation placed by section 6, Article XIII, of the Constitution, upon the amount of indebtedness which a city may incur, in addition to the three per cent limit, for the purpose of procuring a water supply, is that it must have the approval of the taxpayers affected thereby.—*McClintock v. City of Great Falls*, 221.

Water Supply Indebtedness—Statutes.

9. Under section 3259, Revised Codes, the authority of a city to incur indebtedness beyond the constitutional three per cent limit for the purpose of rendering or maintaining its water supply wholesome and fit for human consumption is implied, if not expressly conferred.—*McClintock v. City of Great Falls*, 221.

Water Plants—Revenues—Surplus Funds—May be Disposed of, How.

10. Where, after making ample provision for retiring bonds issued to procure a water system, a city had accumulated a surplus over and above the amount necessary to discharge the interest on the indebtedness as it became due, it could properly expend such surplus in part payment of a necessary filtration plant, without the sanction of a taxpayers’ vote, transfer it to its general fund, place it in a special fund, or devote it to any legitimate municipal purpose, without running counter to the provision of section 6, Article XIII, above, that the revenues obtained from the water system shall be devoted to the payment of the debt.—*McClintock v. City of Great Falls*, 221.

Special Improvement Districts—Protests—Right to Withdraw.

11. A property owner in a city who has signed a protest against the creation of a special improvement district may, within the time allowed for presenting such protest, withdraw therefrom and thus defeat the protest.—*Hawley v. City of Butte*, 411.

CLERK OF DISTRICT COURT.

Judgment—Decree—Entry and Rendition—Powers.

1. While the clerk of the district court may enter, *i. e.*, record a decree, he had no power to sign and enter, thus virtually rendering, one in a suit to foreclose mortgages on real and personal property, adjudg-

ing, among other things, that plaintiff recover principal, interest and attorneys' fees, personal liability therefor on the part of defendants, *etc.*, where the trial judge had done no more than transmitted to him his findings of fact and conclusions of law, without any further directions in the matter.—State ex rel. Reser v. District Court, 235.

Entry—Prerequisite.

2. The proper functions of the clerk of the district court touching the entry of judgment are purely ministerial, and must be based upon a judgment actually pronounced, though not necessarily written and signed, or one pronounced by law, as in cases of default, verdict, *etc.*—State ex rel. Reser v. District Court, 235.

Same—Discretion.

3. The instances in which the clerk of the district court may enter judgment without express direction or pronouncement by the court are confined to those where no discretion can be exercised as to the terms of the judgment.—State ex rel. Reser v. District Court, 235.

COLLATERAL ATTACK.

See, also, Adoption, 1, 2.

Official Acts.

1. The acts of an officer done *colore officii* are proof against collateral attack.—State ex rel. Dunne v. Smith, 341.

COMBINATIONS.

See Labor Unions, 4.

COMMISSIONS.

See Brokers, 1.

COMMON CARRIERS.

See Railroads.

COMPROMISE AND SETTLEMENT.

Admissibility of compromise offer in evidence,—see New Trial, 7.

CONDEMNATION PROCEEDINGS.

See Eminent Domain.

CONSPIRACY.

See Labor Unions, 4.

CONSTITUTIONAL LAW.

Creation of new counties by special Act,—see Statutes and Statutory Construction, 13.

Unreasonable searches and seizures,—see Criminal Law, 34.

Initiative—Status of Enactment.

1. Statutes enacted by the people directly under the initiative are of equal dignity with those passed by the legislative assembly and approved by the governor; in the enactment of the former the provisions of the state Constitution can no more be transgressed than in that of the latter.—State ex rel. Evans v. Stewart, 18.

Legislative Power.

2. The state legislature possesses plenary legislative power, except as limited by the Constitution of the United States, the treaties made and

statutes enacted pursuant thereof, and by the Constitution of the state. State ex rel. Evans v. Stewart, 18.

Same—Constitutional Limitations.

3. The authority of the legislature, otherwise plenary, will not be held circumscribed by implication; but one who seeks to limit it must be able to point out the particular provisions of the Constitution which contains the limitation in clear terms.—State ex rel. Evans v. Stewart, 18.

Injunction—Freedom of Speech.

4. Since under section 10, Article III, of the state Constitution, one may publish what he pleases, subject only for penalty for abuse of such discretion, he cannot be prevented from doing so by injunction.—Empire Theater Co. v. Cloke, 183.

Legislative Construction—Effect.

5. Though courts are not bound by legislative construction of the Constitution; yet, if long acquiesced in, such construction is entitled to most respectful consideration.—McClintock v. City of Great Falls, 221.

Nature of Instrument.

6. The state Constitution is not a grant of, but a limitation upon powers which may be exercised, among others, by the legislative branch of the state government.—McClintock v. City of Great Falls, 221.

County Offices—Vacancies—Appointment.

7. The vacancies in county offices referred to in the last clause of section 5, Article XVI, of the state Constitution, the appointees to fill which shall hold until the next succeeding general election, are those occurring after the fixed term has commenced, but before a general election; and no appointment holds good beyond the next succeeding general election, whether the interval between it and the fixed term be great or small.—State ex rel. Dunne v. Smith, 341.

Nature of Instrument.

8. The state Constitution is not a grant but a limitation of powers.—Edwards v. County of Lewis and Clark, 359.

Counties—Borrowing Money—Creating Indebtedness—Statutes.

9. Held, that the words "incur indebtedness or liability," used in section 5, Article XIII, Constitution, and "borrow money," found in section 2933, Revised Codes, referring to the power of the county to do either, are not synonymous; the former having to do with the creation of new indebtedness, while the latter deals with borrowing money through the instrumentality of issuing bonds for any of the purposes mentioned in the Title of which the section forms a part.—Edwards v. County of Lewis and Clark, 359.

Statutes—Constitutional Construction—Rule.

10. Where a statute is assailed as unconstitutional, the question is not whether it is possible to condemn, but whether it is possible to uphold, and it will not be declared unconstitutional unless its nullity is placed, in the court's judgment, beyond reasonable doubt.—State ex rel. Fenner v. Keating, 371.

Constitutional Construction—Rule.

11. In interpreting a constitutional provision, the language used therein must be taken as having been designed to meet the needs of a progressive society, and should not be strictly confined to its meaning as understood at the time the instrument was adopted.—State ex rel. Fenner v. Keating, 371.

Elections—Voting Machine Statute—Constitutionality.

12. Held, that the Act providing for the use of voting machines (Laws 1907, Chap. 168 [secs. 609–625, Rev. Codes]) is not invalid as in con-

travention of the provision of section 1, Article IX, Constitution of Montana, that all elections by the people shall be "by ballot," the term "ballot" being employed, not to designate a piece of paper, but a method to insure, so far as possible, the secrecy and integrity of the popular vote.—State ex rel. Fenner v. Keating, 371.

Election Contest—Attorney's Fee—Statute—Constitutionality.

13. *Held*, that sections 48 and 49 of the Corrupt Practices Act, awarding the successful party in an election contest attorney's fees, etc., are not open to constitutional objections that they deny to the unsuccessful one the equal protection of the laws, grant to the former a special privilege not enjoyed by successful litigants in other cases, violate the provision that justice shall be administered without sale, denial or delay, and constitute an attempt to delegate legislative power to the courts.—Doty v. Reece, 404.

CONSTITUTION OF MONTANA.

(List of Sections Cited or Commented upon.)

Article	III, section	6	408, 410
Article	III, section	8	355
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Article	VIII, section	27	355
Article	IX, section	1	377
Article	IX, section	2	144
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Article	XI, sections	2, 3	23 <i>et seq.</i>
Article	XI, section	12	23 <i>et seq.</i>
Article	XII, section	1	167
Article	XII, section	8	365, 369
Article	XII, section	11	31
Article	XII, section	14	24
Article	XIII, section	1	29
Article	XIII, section	3	115
Article	XIII, section	5	29, 368 <i>et seq.</i>
Article	XIII, section	6	225 <i>et seq.</i>
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CONTRACTS.

See, also, Brokers; Cities and Towns, 1-3.

Agreement to Enter into—Not Enforceable.

1. An agreement to enter into an agreement upon terms to be afterward settled between the parties cannot, as a general rule, be enforced. Livingston Waterworks v. City of Livingston, 1.

Terms—Rates and Prices—When not Specifically Enforceable.

2. Where a contract leaves the matter of rates or prices uncertain, it cannot be specifically enforced unless they can be made certain by

means provided in the contract itself.—*Livingston Waterworks v. City of Livingston*, 1.

Breach—Agency—Evidence—Admissibility.

3. In an action for breach of a contract for the feeding of sheep, admission of evidence that defendants had impressed upon plaintiffs' agent in charge of the sheep that payment of feeding charges would have to be made monthly as required by the contract, was not reversible error.—*Rea v. Alfalfa Products Co.*, 90.

Same—"Cancellation"—Instructions—Technical Error—Effect.

4. Where the question of the cancellation of a contract was not involved in an action for damages for its breach, the technical misuse of the term "cancellation" in an instruction was not sufficient to reverse the judgment where from the charge as a whole the jury must have understood that the term was used in the sense that defendants were not bound to continue after plaintiffs breached the contract by an unjustifiable failure to pay a previous monthly bill.—*Rea v. Alfalfa Products Co.*, 90.

Real Property — Water Rights — Conveyances — Rescission — Fraud—Complaint.

5. Complaint in an action seeking rescission of a contract of sale of agricultural lands needing irrigation, which in effect alleged that, though defendant represented to plaintiff that the ranch "had plenty of water and that water was going to waste thereon," the only water available for irrigation purposes was such as had to be procured from other persons, was sufficient to charge fraud, even though an inference was permissible therefrom that water, not under the control of defendant, was procurable elsewhere.—*Petit v. Sinclier*, 317.

Same—Fraud—Damages—Presumptions.

6. If the representations made by defendant, relating to a vital element of the contemplated transfer of land, were false and were relied upon by plaintiff, damage necessarily ensued to the latter.—*Petit v. Sinclier*, 317.

Same—Contracts in Writing—Parol Evidence—Admissibility.

7. In a suit to rescind a written contract for the sale of land for fraud inducing it, the rule that a writing cannot be varied by parol does not apply.—*Petit v. Sinclier*, 317.

Same—Water Rights—False Representations.

8. A paper appropriation of water rendered unavailable by prior claims could not meet defendant's representation that there was plenty of water on the lands he sold to plaintiff.—*Petit v. Sinclier*, 317.

Same—Evidence—Variance—What is not.

9. In suit for rescission of a written contract stipulating for a conveyance by defendant of a right to 150 cubic inches of appropriated water per second of the waters of a creek used in connection with the irrigation of defendant's land, evidence tending to show that defendant possessed no such right was not inadmissible as an attempt to vary the terms of a writing.—*Petit v. Sinclier*, 317.

Lease of Sheep—Construction by Parties.

10. Where the parties to a lease of a band of sheep construed the contract so as to express their intentions and acted in accordance therewith, the court will adopt the construction they placed upon it as to which party had title to lambs sold by the lessee.—*National Bank of Gallatin Valley v. Ingle*, 414.

Same—Chattel Mortgages—Priority—Lessor's Lien.

11. Where a band of sheep was leased, the lessee to receive half the wool and lambs, and the latter mortgaged the lambs, and, when the division of lambs between lessor and lessee took place, the lessor had

notice of the mortgage, but consented to the division, he waived his lien; so that when the lessee directed the purchaser of his share of the lambs to pay the money to a bank, the direction constituted a verbal assignment, upon which the bank could maintain its action.—National Bank of Gallatin Valley v. Ingle, 414.

Same—Rights of Third Persons—"Innocent Purchaser."

12. An "innocent purchaser" is one who pays or obligates himself to pay the full purchase price of mortgaged property to the vendor, with no notice of any claim or right to the property in another.—National Bank of Gallatin Valley v. Ingle, 414.

Procuring Testimony—Public Policy—Champerty and Maintenance.

13. A contract under which plaintiff agreed to search for legitimate evidence and find witnesses in possession of facts relevant and material to the issues in defendant's personal injury action, compensation to be contingent upon a successful outcome of the litigation, *held* not to contravene public policy.—Haley v. Hollenback, 494.

Same—Validity.

14. Parties are free to contract as they please, so long as the contemplated engagement is not prohibited as illegal or contravenes public policy; and the fact that the obligee may under it do things to the public injury does not itself invalidate it.—Haley v. Hollenback, 494.

Interpretation—Rule.

15. In construing contracts, courts must give them such an interpretation as will make them lawful, if this can be done without violating the intention of the parties.—Haley v. Hollenback, 494.

Written Contracts—Ambiguity—Evidence.

16. It is only where the terms of a written agreement are not clear and free from ambiguity that recourse may be had to the attendant circumstances in explanation of the intention of the party; one which clearly and explicitly expresses such intention is not in need of interpretation.—Brockway v. Blair, 531.

CONVERSION.

What Constitutes.

1. The wrongful seizure and sale of personal property by a constable constitutes a conversion.—Ferrat v. Adamson, 172.

Measure of Damages—Erroneous Instruction.

2. In an action in conversion, the giving of an instruction submitting to the jury the measure of damages declared by section 6068, Revised Codes, is error, the rule thus established being inapplicable to such a case.—Ferrat v. Adamson, 172.

Same—Proper Instructions.

3. In an action in conversion, the measure of damages established by section 6071, Revised Codes, is controlling, unless special damages are pleaded and proved, in which event correct practice requires an instruction so supplementing the measure pointed out by said section as to allow such additional damages as may be warranted by the circumstances of the particular case.—Ferrat v. Adamson, 172.

Trespass.

4. Every conversion of personal property implies a trespass.—Ferrat v. Adamson, 172.

Punitive Damages—Argumentative Instructions.

5. Where the court had adequately covered the subject of punitive damages, it was improper to give an argumentative instruction that, if defendant constable levied upon the property "in a high-handed way to oppress plaintiff" with malicious purpose, the jury could in its discretion award punitive damages.—Ferrat v. Adamson, 172.

CORPORATIONS.

Officers and Directors—Duties.

1. By virtue of their fiduciary relation to the stockholders neither the president nor the directors of a corporation may divert its assets to any use other than such as will serve the purpose of its organization, and hence may not in any event appropriate the assets to their own use.—*Hanson Sheep Co. v. Bank*, 324.

Same—Burden of Proof.

2. When it appears that the president or a director of a corporation has been dealing with it, the burden is upon him to show that his dealings have been fair and honest.—*Hanson Sheep Co. v. Bank*, 324.

Acts of Officers and Directors—Estoppel.

3. Where a corporation, with neither board of directors nor secretary, had permitted its president to exercise all its powers and functions for seven years after its organization, he was, so far as the corporation was concerned, possessed of all the powers of the board of directors, and the corporation was estopped to question any of his acts within the scope of its legal powers.—*Hanson Sheep Co. v. Bank*, 324.

Same—Bank Deposit—Authority to Apply.

4. Where the president of a corporation, the stock of which, with the exception of a small portion nominally held by his wife and a brother, was owned by himself, used the corporate name as a cloak under which to conduct his own business, a bank familiar with his manner of conducting the affairs of the ostensible corporation was justified in acting upon his oral direction and applying a deposit made in the corporate name to the payment of notes given it by him to secure private indebtedness.—*Hanson Sheep Co. v. Bank*, 324.

Fraud—Power of Courts.

5. The rule that the legal capacity of a corporation cannot be inquired into collaterally by a private person in a controversy between it and him does not preclude courts to examine into the facts of a particular case to determine the identity of a person who uses the name of a corporation for his own purposes, and to fix liability upon him for the ostensible corporate acts.—*Hanson Sheep Co. v. Bank*, 324.

Same—Evidence—Admissibility.

6. In an action of the kind referred to above, evidence elicited from the president of the corporation as to his relations with it, the extent of his interest and control over it, the ownership of shares of capital stock, and all other facts tending to show that it was merely a colorable corporation, was competent.—*Hanson Sheep Co. v. Bank*, 324.

Directors—Method of Resignation—Statutes.

7. *Held*, that an informal written notice delivered to the president of a corporation by one of its directors, to the effect that the writer thereby resigned his office as such, was sufficient, the method prescribed by section 3852, Revised Codes, in this behalf, being permissive—not exclusive.—*Goodrich Rubber Co. v. Helena Motor Car Co.*, 526.

Stock Subscriptions—Conditions Precedent.

8. A stock subscription agreement, providing that, if a committee appointed from "our number" reported unfavorably on the acquisition of a milling plant, the subscription might be declared void, contemplated as a condition precedent that the committee was to be appointed by all the subscribers.—*Canyon Creek Elevator & Milling Co. v. Allison*, 604.

Same—Unconditional Subscription—Rights of Subscriber.

9. Ordinarily an unconditional stock subscription is a continuing offer until the proposed corporation is formed, and until that time it may be withdrawn at the subscriber's option.—*Canyon Creek Elevator & Milling Co. v. Allison*, 604.

Same—Conditional Subscription.

10. Where a stock subscription agreement contains a condition precedent, the condition must be fulfilled, or the agreement is not binding, although the corporation is formed.—Canyon Creek Elevator & Milling Co. v. Allison, 604.

Same—Conditional Subscription—Breach of Condition.

11. Where a stock subscription agreement provided that if a committee, appointed from the subscribers, should report unfavorably on a certain plant, the subscriber might withdraw, evidence that a self-constituted committee inspected and reported favorably on such plant did not make the subscription contract binding.—Canyon Creek Elevator & Milling Co. v. Allison, 604.

Same—Waiver of Condition.

12. A stock subscription provision, that it might be declared void if a committee selected by the subscribers should report unfavorably on a certain plant, was not waived by a subscriber, who, knowing that a self-constituted group of subscribers had inspected and reported favorably, did not attend their meetings or ratify their action.—Canyon Creek Elevator & Milling Co. v. Allison, 604.

Same—Withdrawal of Subscription—Notice.

13. Defendant in an action to collect a stock subscription made under the condition precedent mentioned above, which remained unfulfilled, was not obliged to give notice of his withdrawal, although the corporation was thereafter fully organized; having, however, given oral notice of his intention to withdraw, it was sufficient.—Canyon Creek Elevator & Milling Co. v. Allison, 604.

COUNTIES.

County offices—Filling vacancies,—see Office and Officers, 1–5.

Creation of new counties by special law,—see Statutes and Statutory Construction, 13.

Loaning credit,—see Farm Loans, 6.

Claims Against—Appeal—District Court—Parties.

1. On appeal from an order of the board of county commissioners allowing or disallowing a claim against the county (Rev. Codes, secs. 2947, 2948), the parties are the county and the claimant, or, in a taxpayer's suit, the county and the objecting taxpayer.—Albers v. Barnett, 71.

Same—Appeal—Extent of Jurisdiction of District Court.

2. The jurisdiction of the district court on appeal from an order made by county commissioners allowing or disallowing a claim against the county is limited to the determination of the question whether the action of the board was correct and to a declaration affirming or reversing it, with a judgment for costs.—Albers v. Barnett, 71.

Same—Erroneous Judgment.

3. On appeal by a taxpayer from an order of the county commissioners allowing a claim against the county, the district court adjudged that the claim had been allowed and a warrant issued in payment thereof without authority of law, and that the county was entitled to recover back the amount of the warrant; *held* error under the rule *supra* (par. 2). Albers v. Barnett, 71.

Bridges—Not County Property.

4. Bridges belong to the public and not to any particular county, irrespective of the source from which the funds—special or otherwise—for their construction were derived.—State ex rel. Furnish v. Mullendore, 109.

New Counties—Apportionment of Indebtedness—*Mandamus*.

5. *Mandamus* is the proper remedy to compel commissioners appointed to adjust county indebtedness between an old and a new county to re-assemble and correctly apportion such indebtedness; the fact of their adjournment being immaterial.—State ex rel. Furnish v. Mullendore, 109.

Same—Parties.

6. *Mandamus* proceedings to compel commissioners to correctly apportion the indebtedness between an old and new county should be brought in the name of the county, and not by the board of county commissioners in their official capacity.—State ex rel. Furnish v. Mullendore, 109.

Powers—Constitution.

7. A county is a subdivision of the state for governmental purposes, and as such is subject to legislation, regulation and control, except in so far as the Constitution has placed limitations upon the law-making power.—Edwards v. County of Lewis and Clark, 359.

Powers.

8. Unless a county can find authority in the statutes for a contemplated act, it is powerless to carry it into execution.—Edwards v. County of Lewis and Clark, 359.

Issuance of Refunding Bonds—Powers.

9. The authority of the board of county commissioners to issue refunding bonds in excess of \$10,000 must be determined by reference to section 2905, Revised Codes, as amended (Laws 1915, p. 47), and section 2933.—Edwards v. County of Lewis and Clark, 359.

Same—Electors' Vote Necessary, When.

10. *Held*, under sections 2905 and 2933, above, that the board of county commissioners could not issue bonds, in excess of \$10,000, for the purpose of refunding outstanding road warrants, without having first obtained the approval of the electors of the county.—Edwards v. County of Lewis and Clark, 359.

Borrowing Money—Creating Indebtedness—Constitution—Statutes.

11. *Held*, that the words "incur indebtedness or liability," used in section 5, Article XIII, Constitution, and "borrow money," found in section 2933, Revised Codes, referring to the power of the county to do either, are not synonymous; the former having to do with the creation of new indebtedness, while the latter deals with borrowing money through the instrumentality of issuing bonds for any of the purposes mentioned in the Title of which the section forms a part.—Edwards v. County of Lewis and Clark, 359.

New Counties—Public Policy.

12. The creation of new counties is a matter of public policy.—State ex rel. Ford v. Schofield, 502.

COUNTY COMMISSIONERS.

Filling vacancies in county offices,—see Office and Officers, 1-5.

Removal for accepting illegal fees,—see Office and Officers, 6-13.

CRIMINAL LAW.**Arrest on Warrant—Peace Officers—Powers.**

1. The person named in a warrant of arrest must submit even though not guilty of any offense, and the officer, after making his purpose known and exhibiting the warrant if requested to do so, may use such force as is necessary to effect the arrest, without subjecting himself to a charge of trespass.—State v. Bradshaw, 96.

Arrest Without Warrant—Power of Officer.

2. A peace officer can make an arrest without a warrant only under the circumstances specified in section 9057, Revised Codes.—*State v. Bradshaw*, 96.

Same—When Resistance not Crime.

3. Where an officer attempts to make an arrest without a warrant, under circumstances other than those enumerated in section 9057, Revised Codes, the person sought to be arrested may use such force as may be necessary to prevent the arrest, or to effect his escape after arrest.—*State v. Bradshaw*, 96.

Same—Resisting Officer—Burden of Proof.

4. In a prosecution for resisting an officer attempting to make an arrest without a warrant, the existence of any one of the emergencies pointed out by section 9057, Revised Codes, justifying the arrest, must be clearly established; proof of a mere belief in its existence, though entertained in the utmost good faith, being insufficient.—*State v. Bradshaw*, 96.

Same—Duty of Officer.

5. An officer about to make an arrest without a warrant must make known his official character if unknown to the offender, else the latter need not submit.—*State v. Bradshaw*, 96.

Livestock—Driving from Range—Statutes.

6. *Held*, that section 8858, Revised Codes, and not section 8860—both of which make unlawful the driving of livestock from their accustomed range—declares the law upon the subject.—*State v. Bradshaw*, 96.

Same—Driving from Range.

7. Until the person who acquires title to public lands chooses to make exclusive use of them, either by erecting lawful fences or by keeping animals running at large driven beyond his boundaries, they may be used for grazing purposes by others; if he chooses to exercise his right by driving them away, he is not required to drive them to any particular portion of their accustomed range, driving them beyond his boundaries being sufficient.—*State v. Bradshaw*, 96.

Arrest Without Warrant—Resisting Officer—Insufficient Evidence.

8. *Held* that inasmuch as defendant, charged with resisting a deputy sheriff in an attempted arrest, without a warrant, for unlawfully driving cattle from their accustomed range, committed no wrong in driving the cattle from portions of the public domain acquired by him and leaving them on the range in the vicinity of lands belonging to their owner, he was not, under section 9057, *supra*, subject to arrest without a warrant, and therefore not guilty of any offense in resisting arrest.—*State v. Bradshaw*, 96.

Circumstantial Evidence—Quantum of Proof.

9. Where a conviction is sought upon circumstantial evidence alone, the circumstances proved must not only be consistent with each other and with the hypothesis of defendant's guilt, but inconsistent with any rational hypothesis other than defendant's guilt.—*State v. Postal Telegraph Cable Co.*, 104.

Conviction—Conjecture Insufficient Basis.

10. A conviction cannot be founded upon conjecture, however shrewd, nor upon probabilities, however strong.—*State v. Postal Telegraph Cable Co.*, 104.

Horse-races—Betting—Evidence—Insufficiency—Telegraphs—Transmission of Information.

11. Evidence *held* insufficient to justify conviction of a telegraph company for transmitting information for the purpose of having a bet or wager made upon a horse-race in violation of Chapter 55, Laws of 1915. *State v. Postal Telegraph Cable Co.*, 104.

Same—Precautionary Instruction.

12. Since the offense denounced by Chapter 55, Laws of 1915, consists in transmitting information concerning a horse-race for the purpose of having bets or wagers made, an instruction should be given in a prosecution for such an offense that it is not wrongful to transmit such information if bets or wagers are not to be made.—*State v. Postal Telegraph Cable Co.*, 104.

Trial—Exceptions—Duty of Court.

13. An exception to an adverse ruling by the district court is a matter of right—not one of grace or discretion on the part of the court—and when taken, the court stenographer must enter it.—*State v. Postal Telegraph Cable Co.*, 104.

Information—Indorsement of Witness' Names.

14. Leave to indorse names of witnesses upon an information during the course of a criminal trial should be granted if the defendant does not show prejudice by reason of such indorsement.—*State v. Gaimos*, 118.

Former Jeopardy—When Defense Available.

15. The plea of once in jeopardy is available where, after the defendant has been brought to trial in a competent court upon a sufficient indictment or information before a jury duly impaneled and sworn, the proceeding has, without necessity or at the instance of the accused, ended in a discharge of the jury before verdict, and the defendant is sought to be tried for the same offense.—*State v. Gaimos*, 118.

Rape—Former Jeopardy—When Defense not Available.

16. Where an information charging rape was dismissed after commencement of trial but before verdict, and a new one filed fixing the time of the commission of the crime fifty days later, the defense of once in jeopardy was not available, since the offense charged in the second information was neither the same but a new and independent one, nor one "necessarily included" in the first charge within the meaning of section 9216, Revised Codes.—*State v. Gaimos*, 118.

Same—Variance.

17. If the information charging rape fixes a definite date and the evidence discloses that a mistake occurred in the pleading, and that the identical crime charged was committed upon another date, but before the information was filed, the prosecution will not necessarily fail, though defendant may be entitled to a continuance because of the variance.—*State v. Gaimos*, 118.

Same—Evidence of Other Acts—Admissibility.

18. Though evidence of other acts of like character to that charged in an information for rape is admissible to show the intimate relationship existing between the prosecutrix and the defendant, for the purpose of corroboration, the commission of an independent crime cannot be thus shown.—*State v. Gaimos*, 118.

Same—Pleading and Proof—Election.

19. The state cannot, in a prosecution for rape, prove two or more of such offenses, and then select any one of them as the one for which conviction will be sought, but must, before the defense is gone into, definitely announce which of the acts it relies on as the one charged in the information.—*State v. Gaimos*, 118.

Same—Pleading and Proof—Variance.

20. When the information fixes a date and the evidence shows an act of the character charged at that time, the state cannot claim a conviction under the same information for a similar act at some other time. *State v. Gaimos*, 118.

Same—Former Jeopardy—Jury Question.

21. In a prosecution for rape, in which defendant pleaded former jeopardy, the question whether the offense charged in the information

then before the court was the same as that alleged in a former one was a question of fact for the jury's determination.—*State v. Gaimos*, 118.

Same—Proof—Uncorroborated Testimony of Prosecutrix.

22. Though in a prosecution for rape, where the state relies upon the uncorroborated testimony of the prosecutrix, the jury should be cautious of convicting, yet a verdict of guilty under such circumstances should not be set aside unless the story told by her is so inherently improbable or is so nullified by material self-contradictions that no fair-minded person could believe it.—*State v. Gaimos*, 118.

Same—Instructions—Harmless Error.

23. Where prosecutrix had testified to two acts of intercourse, one on the date named in the information and another on a previous day, an instruction that it was not necessary for the state to prove the date of the alleged offense precisely as charged in the information was not prejudicial, in view of a further instruction that evidence of other acts than the one charged was admissible only for the purpose of corroboration.—*State v. Gaimos*, 118.

Same—Documentary Evidence—Inadmissibility.

24. Statements of a county superintendent of schools made in a prosecution for rape, based upon the contents of a book not made a record by law nor even a file in her office, the entries in which she had not made and for the correctness of which neither the witness nor anyone else could vouch, were properly stricken.—*State v. Gaimos*, 118.

Grand Larceny—Former Conviction—Jury—Peremptory Challenges.

25. Defendant, on trial for grand larceny aggravated by a prior conviction of the same offense, was, under subdivision 2 of section 9257, Revised Codes, entitled to eight—not six—peremptory challenges.—*State v. Collins*, 213.

Same—Limiting Peremptory Challenges—Record—Insufficiency.

26. Where defendant's bill of exceptions recited that, though entitled to eight peremptory challenges, he was accorded only six, but did not show whether he exercised all or any of the challenges allowed him, or offered to exercise one or both of those claimed to have been denied, it was insufficient to show that the court erred in depriving him of his right in this behalf.—*State v. Collins*, 213.

Same—"Horse"—Information—Sufficiency.

27. *Held*, that an information alleging that defendant stole a "horse" is a sufficient charge of grand larceny, though subdivision 4, section 8645, Revised Codes, in defining the crime specifies the different species of the animal as diversified by age, sex or artificial means, *i. e.*, mare, gelding, stallion, *etc.*—*State v. Collins*, 213.

Same—Livestock—Brands—Evidence—Variance.

28. After a horse had been identified by color, weight, brand and other distinguishing marks, as described in the information, evidence that the animal bore another brand did not constitute a fatal variance.—*State v. Collins*, 213.

Same—Former Conviction—Variance—Failure of Proof.

29. Where defendant was found guilty of simple larceny under a charge of grand larceny aggravated by prior conviction, the failure of the state to introduce proof of the prior conviction constituted neither a failure of proof nor a variance, since section 9172, Revised Codes, authorizes conviction of any crime included in that charged, and aggravated larceny includes simple larceny.—*State v. Collins*, 213.

Same—Former Conviction—Instructions.

30. Where the information charged grand larceny after previous conviction, but no evidence of the previous conviction had been introduced, it was proper to instruct the jury to disregard the allegation of prior

conviction, and, if they found defendant guilty, to fix his punishment as for a simple larceny.—State v. Collins, 213.

Donlan "White Slave" Act—Females—"Immoral Purposes."

31. Defendant attempted to entice a seventeen-year old girl to accept a position in a hotel in a neighboring state, informing her that the place was a sporting-house, and that her duties would be to dance, play cards, drink beer and entertain men. The evidence tended to show that the place was not one where a girl could stay for any length of time and be respectable. *Held* that the purposes of the employment were "immoral" within the meaning of section 2 of the Donlan Act (Laws 1911, Chap. 1).—State v. Reed, 292.

Same—Attempt—When Complete—Jurisdiction.

32. An attempt to induce a female to take up her residence in another state for immoral purposes which was complete before transportation had commenced, was punishable under the Donlan, and not under the Mann, Act.—State v. Reed, 292.

Same—Information—Counts—Evidence—Appeal and Error.

33. Where defendant in a criminal prosecution made no attempt during the trial to have three of four counts of the information withdrawn from the consideration of the jury because unsupported by the evidence, he was not in a position on appeal to raise the question whether a general verdict of guilty can stand where only one of a number of counts has support in the evidence.—State v. Reed, 292.

Same—Evidence—Searches and Seizures—Constitutional Guaranties.

34. The admission in evidence, without defendant's consent, of a letter taken from his private papers, access to which was obtained by keys obtained from his person by officers, did not deprive defendant of his constitutional rights to be secure from unreasonable searches and seizure, and to not be compelled to testify against himself.—State v. Reed, 292.

Same—Information—Amendment—Harmless Error.

35. Alleged error in permitting the state to amend the information, at the close of all the testimony, by inserting the real name of the prosecutrix for that of "Jennie Doe," was harmless.—State v. Reed, 292.

Same—Instructions—"Immoral Purposes"—Reversible Error.

36. An instruction defining "immoral purpose" as used in section 2 of the Donlan Act, *supra*, as "one which is violative of conscience or moral law inconsistent with purity, rectitude or good morals, or hostile to the welfare of the general public," *held* prejudicially erroneous.—State v. Reed, 292.

Same—Letters—Hearsay Evidence.

37. Letters describing and characterizing the place to which a girl was sought to be transported for immoral purposes were inadmissible as hearsay.—State v. Reed, 292.

Same—Opinion Evidence—When Improper.

38. The character of a place to which a girl was attempted to be transported for immoral purposes was not susceptible of proof by expert testimony in the form of opinions.—State v. Reed, 292.

"Criminal Prosecutions"—Nature of Proceeding—Constitution.

39. The words "criminal prosecutions" as used in the Constitution refer to prosecutions for offenses which were crimes at the common law and are crimes under the statute.—State ex rel. Payne v. District Court, 350.

Refusal of Correct Instruction—When not Error.

40. Refusal of a correct instruction on the subject of felonious intent in a prosecution for larceny was not error, where the court had fully

covered the matter by appropriate instructions given.—State v. Wiley, 383.

Information—Degrees of Crime.

41. Where a specific crime is divided into degrees, it is, generally speaking, sufficient to charge the commission of the substantive offense, leaving it to the jury to determine from the evidence the particular degree of which the accused is guilty.—State v. Wiley, 383.

Larceny and Grand Larceny—Instructions.

42. The substantive crime alleged in an information charging the theft of a horse—under section 9324, Revised Codes, made grand larceny without reference to value—being larceny, instructions defining larceny as well as grand larceny were not open to the objection that different definitions of the same offense—some of which inapplicable to the facts of the case—were thus submitted.—State v. Wiley, 383.

Same—“Recent Possession” of Stolen Property.

43. The words “recent possession,” used in an instruction advising the jury relative to the probative value of recent possession of stolen property, *held* to refer to possession in defendant soon after commission of the larceny, and not to possession immediately before the information is filed or a trial had.—State v. Wiley, 383.

Same—Principal and Accessory.

44. Instructions substantially in the words of sections 8119 and 9167, Revised Codes, defining a principal and telling the jury that the distinction between a principal and an accessory had been abrogated by statute, were not improper as implying that a felony had been committed.—State v. Wiley, 383.

Attempt to Commit Murder—Insufficient Information.

44a. Information *held* insufficient to support a judgment of conviction under a charge of attempt to commit murder, in that it failed to allege some overt act which in the ordinary and likely course of events would result in the commission of the crime charged, and went no further than to show preparation to commit it.—State v. Rains, 424.

Witnesses—Competency—Husband and Wife.

45. Under amended section 9483, Revised Codes (Laws 1915, Chap. 111), a wife was competent to testify in a prosecution against her husband for attempted murder.—State v. Rains, 424.

Homicide—Self-defense.

46. Though society may curtail the right of self-defense and restrain its exercise in many particulars, it is deemed necessary to personal safety and security, and is not incompatible with the public good.—State v. Merk, 454.

Same—Justification.

47. Under sections 8301 and 8302, Revised Codes, if the party committing a homicide was the assailant or engaged in mortal combat, he must in good faith have endeavored to decline any further struggle before the killing was done, else he cannot invoke self-defense.—State v. Merk, 454.

Same.

48. A person assailed may act upon appearances as they present themselves to him, meet force with force, and even slay his assailant, though in fact he is not in actual peril, provided circumstances are such that a reasonable man would be justified in acting as he did.—State v. Merk, 454.

Same—Justification—Duty to Retreat.

49. A person assailed with apparent murderous intent need not retreat and seek a place of safety before slaying his assailant.—State v. Merk, 454.

Same—Evidence—Sufficiency.

50. Evidence *held* to show that deceased was the aggressor throughout the difficulty resulting in his death at the hand of accused, so that the latter was justified in shooting deceased.—*State v. Merk*, 454.

Grand Larceny—Hearsay Testimony—Harmless Error.

51. Erroneous admission in evidence of hearsay statements that defendant, charged with the theft of cattle, claimed ownership of them, *held* harmless where he asserted in defense that he owned the animals and undertook to establish such claim by his own testimony as well as by that of others.—*State v. Brodock*, 463.

Same—Settlement of Instructions—Review—Record on Appeal.

52. Under section 9271, Revised Codes, to entitle appellant in a criminal action to a review of an instruction given, the record must disclose that at the time of settlement of the instructions he made suitable objection and reserved an exception thereto.—*State v. Brodock*, 463.

Same—Conclusiveness of Verdict.

53. Where the evidence upon an issue in a criminal case is in conflict, the finding of the jury thereon, approved by the district court in denying a new trial, is conclusive, and the claim that the verdict is contrary to the evidence has no merit.—*State v. Brodock*, 463.

Indictment and Information—Negating Exceptions.

54. Unless an exception found in a statute is a part of the definition of the offense sought to be described, the state is not required to negative such exception in an indictment or information.—*State v. Wood*, 566.

Osteopathy—Practicing Without License—Negating Exception.

55. *Held*, that the proviso in section 1605, subdivision b, that nothing in the section (defining the practice of osteopathy) shall be construed to restrain or restrict a legally licensed physician or surgeon in the practice of his profession, is not an exception within the meaning of paragraph 54, *supra*, since neither physician nor surgeon can practice osteopathy without first obtaining a license from the board of osteopathic examiners.—*State v. Wood*, 566.

Same—Temporary Certificate—Information—Sufficiency.

56. *Held*, further, that the provision of section 1597, Revised Codes, that the secretary of the board of osteopathic examiners may, upon examination, grant a certificate to practice osteopathy until the next meeting of said board, when the temporary certificate shall expire, is not an exception, but a matter of defense, hence the state was not required to negative defendant's possession of a temporary certificate.—*State v. Wood*, 566.

DAMAGES.

See Measure of Damages.

DEATH.

Damages for, by negligence,—see Personal Injuries, 3-9.

DECLARATIONS.

See Evidence, 29.

DEEDS.

See, also, Tax Deeds.

Deeds Absolute—Mortgages—How Character of Instruments Determined.

1. Whether a deed absolute on its face was to evidence a sale or security for a debt only depends upon the intention of the parties at the time of the transaction.—*Robitaille v. Boulet*. 66.

Same—Evidence—Sufficiency.

2. Evidence *held* sufficient to support the court's finding that a deed absolute on its face was intended to evidence a sale, and not a mortgage.—*Robitaille v. Boulet*, 66.

Same—Mortgages—Laches.

3. Where, on the face of a deed absolute in form and an accompanying contract agreeing to reconvey, it clearly appears that the transaction was meant to constitute a mortgage, it will be so declared even if the mortgagor was guilty of laches in asserting his claim, for, "once a mortgage, always a mortgage."—*Elling v. Fine*, 481.

Same.

4. Where papers of the character of the above contained no reference to a loan, no mention of any indebtedness and no engagement by the grantor to pay or do anything, the transaction was *prima facie* a sale with an option to repurchase.—*Elling v. Fine*, 481.

Same—Burden of Proof.

5. The burden of showing that the transaction referred to in paragraph 6, *infra*, was intended as a mortgage, was upon the grantor; and if guilty of laches, he could be barred from making the assertion.—*Elling v. Fine*, 481.

Same—Laches.

6. *Held*, that a grantor of mining property under a deed absolute accompanied by an agreement conferring upon him the right to repurchase upon certain conditions, who stood idly by for more than thirteen years while his grantee treated the property as his own, spent money upon it, paid taxes and died, while his executors operated the property, improved it, and paid taxes, and while it passed through probate proceedings and was formally distributed, was barred by laches from asserting the claim that the transaction was intended for a mortgage and not a sale.—*Elling v. Fine*, 481.

Same—Laches—What not Excuse.

7. In the absence of any step by the grantor above to assert his rights—such as to proclaim his position, demand an accounting, or protest against obnoxious expenditures—lack of funds "to go through with anything" he might "start," *held* not to excuse him for his delay.—*Elling v. Fine*, 481.

DEMURRER.

Admission by,—see Pleading and Practice, 2.

DISCRETION.

Permission to amend complaint during trial,—see Pleading and Practice, 22.
See, also, Clerk of District Court, 3; Elections, 6; Injunction, 1, 11; New Trial, 3; Receivers, 2.

DISMISSAL.

Of appeal—When to be denied,—see Appeal and Error, 25.

DISTRICT COURTS.

Probate jurisdiction,—see Executors and Administrators, 13, 14.

Probate Jurisdiction—Title to Realty.

1. The district court while sitting in probate has no authority to determine questions of title between an estate and persons claiming adversely to it.—*In re Dolenty's Estate*, 33.

Counties—Claims Against—Appeal—Extent of Jurisdiction.

2. The jurisdiction of the district court on appeal from an order made by county commissioners allowing or disallowing a claim against

the county is limited to the determination of the question whether the action of the board was correct and to a declaration affirming or reversing it, with a judgment for costs.—*Albers v. Barnett*, 71.

Same—Erroneous Judgment.

3. On appeal by a taxpayer from an order of the county commissioners allowing a claim against the county, the district court adjudged that the claim had been allowed and a warrant issued in payment thereof without authority of law, and that the county was entitled to recover back the amount of the warrant; *held* error under the rule *supra* (par. 2).—*Albers v. Barnett*, 71.

Trial—Exceptions—Duty of Court.

4. An exception to an adverse ruling by the district court is a matter of right—not one of grace or discretion on the part of the court—and when taken, the court stenographer must enter it.—*State v. Postal Tel. C. Co.*, 104.

Orders of Railroad Commissioners—Power of District Court.

5. *Held*, that the district court has jurisdiction to use the provisional remedy of injunction *in limine* to suspend an order, made and promulgated by the board of railroad commissioners, requiring a railroad company to operate a local passenger train each way daily between designated stations, pending a final determination of an action brought by the company to have the order reviewed as unjust and unreasonable.—*State ex rel. Board of Railroad Commrs. v. District Court*, 229.

DIVORCE.

Minor Children—Custody and Support.

1. In a proceeding looking to the modification of a decree of divorce which made no provision for the custody, control and education of a minor child, the infant's welfare was of paramount consideration.—*Kane v. Kane*, 519.

Same—Custody and Support—Agreement of Parties.

2. While a separation agreement entered into between husband and wife prior to divorce, by which the latter was given the custody of a minor child upon consenting to support it and releasing the former from any further contributions in that behalf, was binding upon the parties, it was not binding upon the child nor the court, which latter could require the father to contribute to the child's support notwithstanding the release, or permit him to visit it if its interests would thereby be promoted, upon condition that he first make such contribution.—*Kane v. Kane*, 519.

Same—Right of Father to Visit Child.

3. On a husband's petition to modify a divorce decree so as to permit him to visit his minor child, the time, place and duration of the visits, his conduct during such visits, and the extent to which he might have the child in his custody, were all proper subjects for regulation by the court.—*Kane v. Kane*, 519.

Same.

4. Unless it appears with reasonable certainty that a divorced husband is morally unfit to associate with his minor child, he should, in view of the fact that the tie between parent and child is one of the most binding in human life and not lightly to be disregarded, be granted the privilege.—*Kane v. Kane*, 519.

Same—Removal of Child from Jurisdiction—Power of Court.

5. In such a proceeding as the above, the court may forbid the party to whom the custody of a minor child has been awarded to remove it from its jurisdiction.—*Kane v. Kane*, 519.

EJECTMENT.

See Tax Deeds.

ELECTION.

See Criminal Law, 19.

ELECTIONS.

Local option,—see Intoxicating Liquors, 1.

Voting Machine Statute—Constitutionality.

1. *Held*, that the Act providing for the use of voting machines (Laws 1907, Chap. 168 [secs. 609–625, Rev. Codes]) is not invalid as in contravention of the provision of section 1, Article IX, Constitution of Montana, that all elections by the people shall be “by ballot,” the term “ballot” being employed, not to designate a piece of paper, but a method to insure, so far as possible, the secrecy and integrity of the popular vote.—State ex rel. Fenner v. Keating, 371.

Same.

2. Chapter 168, Laws 1907, requiring that voting machines shall be constructed so that they cannot be tampered with, does not require a machine which is proof against all tampering or manipulation but one which, when honestly operated, will enable an elector to secretly cast his vote as he wishes to cast it and have it counted as cast, and which cannot be tampered with or manipulated in such a way that, though properly operated by the elector, it would seem to receive and record his vote without doing so.—State ex rel. Fenner v. Keating, 371.

Ballots—Official Stamp on Stub—Removal—Effect.

3. Where ballots had been delivered to electors by the judges of election with the official stamp apparently in the place in which the law (Rev. Codes, sec. 551) requires it to be, although in reality it was on the stub instead of on the ballot proper, the act of the judges in removing the stamp with the stub—thus leaving the ballot without the stamp—did not render the ballots void.—Harrington v. Crichton, 388.

Same—Erroneous Act of Election Officials—Effect.

4. The strict rule that an elector who negligently receives an unstamped ballot will not be heard to complain that his ballot remains uncounted because void does not obtain where a stub is provided for at the head of the ballot separated from it by a perforation requiring minute scrutiny to determine its presence, to be removed when the ballot is cast, where fraud is not present, and where the error by reason of which it is sought to disfranchise him was that of the election officials in placing the stamp upon the stub instead of on the ballot itself. Harrington v. Crichton, 388.

Same—Electors must Exercise Ordinary Care.

5. An elector is chargeable with no more than ordinary care, in casting his ballot, to ascertain that the official stamp is placed thereon in the position in which the law apparently requires it to be, and to so fold it as to have the stamped inscription in view.—Harrington v. Crichton, 388.

Election Contest—Attorney's Fee—Discretion.

6. Under sections 48 and 49 of the Corrupt Practices Act (Laws 1913, pp. 612, 613), the prevailing party in an election contest, be he petitioner or respondent, is entitled to attorneys' fees in addition to his other costs and disbursements, the amount to be awarded in that behalf resting upon the sound discretion of the trial court.—Doty v. Reece, 404.

Same—Attorney's Fee—Statute—Constitutionality.

7. *Held*, that sections 48 and 49 of the Corrupt Practices Act, awarding the successful party in an election contest attorney's fees, etc., are not open to constitutional objections that they deny to the unsuccessful one the equal protection of the laws, grant to the former a special privilege not enjoyed by successful litigants in other cases, violate the provision that justice shall be administered without sale, denial or delay, and constitute an attempt to delegate legislative power to the courts.—*Doty v. Reece*, 404.

Same—Appeal and Error—Assigning Error for Party not Appealing.

8. Appellant (petitioner) in an election contest was not in a position to raise the point that, because the sureties on the bond required of him before instituting the proceeding were not given their day in court previous to granting his opponent attorneys' fees, the award was not warranted.—*Doty v. Reece*, 404.

Same—Attorney's Fee.

9. Where the contestant in an election dispute fails to make out a *prima facie* case, he may be taxed with a reasonable attorney's fee in favor of the contestee.—*Sommers v. Gould*, 538.

Same—Residence—Evidence—Declarations—Admissibility.

10. The residence of a voter is to be determined from his acts and intent; it may be established by circumstantial evidence, as well as by his declarations touching the subject, if a part of the *res gestae*, or if made in disparagement of his right to vote, at or before the election.—*Sommers v. Gould*, 538.

Same—Lack of Qualifications—Presumptions.

11. Slight proof of the lack of any necessary qualification to vote is sufficient to overcome the presumption arising from registration or previous voting, and calls for evidence in affirmation of the voter's qualifications, from the party who would benefit from the vote.—*Sommers v. Gould*, 538.

Same—Residence—*Prima Facie* Case.

12. By establishing as a fact that a voter's family resided in a city ward other than the one in which he voted, contestant made out a *prima facie* case against the voter's right to vote where he did cast his ballot. *Sommers v. Gould*, 538.

Same—Correctness of Returns—Evidence.

13. Until impeached, election returns furnish *prima facie* evidence of their correctness.—*Sommers v. Gould*, 538.

EMINENT DOMAIN.

Public Utilities—Choice of Route.

1. The rule that a public utility—such as a telegraph company—has the right to determine for itself where the line of its utility shall be operated refers to its right to condemn, not to any right to trespass upon, private property for that purpose.—*Postal Telegraph-Cable Co. v. Nolan*, 129.

EQUITY.

See, also, particular subjects of Equity Jurisdiction.

Findings—Conclusiveness,—see Appeal and Error, 24.**Credibility of Witnesses.**

1. In an equity case, the determination of the trial court on the credibility of a witness cannot be interfered with, unless his testimony is characterized by such inherent improbability as in effect to destroy it. *Parchen v. Chessman*, 430.

ESTOPPEL.

Municipal Contracts—Specific Performance—Renewal Agreement.

1. Where the renewal of a twenty year water contract between a city and a water company became the subject of controversy immediately after its expiration, the company was not in position to assert estoppel because misled into making costly expenditures on the plant by the conduct of the city.—*Livingston Waterworks v. City of Livingston*, 1.

Tax Deeds—Invalidity.

2. Tax deeds are antagonistic to the fee; there is no privity between the holder of the one and the holder of the other, and neither owes any duty to, nor is estopped from making any claim against, the other.—*Horsky v. McKennan*, 50.

Same.

3. That the holder of the fee signed assessment lists containing faulty descriptions of the property later sold for unpaid taxes; that, though present at the sale, he did not object to the method adopted; and that it was at his instance that the purchaser at the sale appeared, did not estop him to contest the validity of the deeds.—*Horsky v. McKennan*, 50.

When not Available.

4. Defendant company not appearing to have been misled to its prejudice by anything said or done by plaintiff, the claim that he was estopped by his conduct to claim damages was without merit.—*Scheffer v. Chicago, M. & P. S. Ry. Co.*, 302.

Corporations—Acts of Officers and Directors.

5. Where a corporation, with neither board of directors nor secretary, had permitted its president to exercise all its powers and functions for seven years after its organization, he was, so far as the corporation was concerned, possessed of all the powers of the board of directors, and the corporation was estopped to question any of his acts within the scope of its legal powers.—*Hanson Sheep Co. v. Bank*, 324.

Right to Assert.

6. A party who was not misled to his prejudice by anything done by his adversary is not in a position to assert estoppel.—*National Bank v. Ingle*, 414.

Chattel Mortgages—Possession.

7. Where, at the time chattels were sought to be mortgaged to a bank, their possession of them in the ostensible mortgagor was no different than it had known it to be for two years prior thereto, to-wit, as manager of the owner, and the bank did not part with value, it was not in position to claim prejudice because of any apparent change of possession.—*Loud v. Hanson*, 445.

EVIDENCE.

Tax Deeds—Notice.

1. A tax deed is not even *prima facie* evidence that the holder of the certificate, before applying for the deed, gave the thirty day notice of intention to apply therefor required by law to be given before the deed could issue.—*Horsky v. McKennan*, 50.

Same—Ejectment—Adverse Possession—Trusts.

2. Where defendants in ejectment relied on adverse possession under tax deeds for more than the statutory period, as well as on estoppel, refusal of an offer of proof that they went into possession under a trust agreement under which they were to hold the property until from the rents and profits thereof they had reimbursed themselves for moneys owing to and for outlays made by them in caring for it, whereupon

reconveyance should be made to plaintiff, was error.—*Horsky v. McKennan*, 50.

Comment upon, by Court.

3. The rule forbidding trial judges from commenting on the evidence during trial does not apply where counsel, to whom the judge remarked that the facts he was incorporating in a question to a witness were not as he stated them, was assuming a state of facts not warranted by the evidence.—*Rea v. Alfalfa Products Co.*, 90.

Appeal—Admission—Technical Error.

4. Technical error in the reception of evidence as to facts admitted does not command a reversal.—*Rea v. Alfalfa Products Co.*, 90.

Contracts—Breach—Agency—Evidence—Admissibility.

5. In an action for breach of a contract for the feeding of sheep, admission of evidence that defendants had impressed upon plaintiffs' agent in charge of the sheep that payment of feeding charges would have to be made monthly as required by the contract, was not reversible error.—*Rea v. Alfalfa Products Co.*, 90.

Appeal and Error—Rebuttal—Proper Rejection.

6. Rejection of testimony in rebuttal was not error where there was nothing to rebut.—*Rea v. Alfalfa Products Co.*, 90.

Documentary Evidence—Inadmissibility.

[7] 8. Statements of a county superintendent of schools based upon the contents of a book not made a record by law nor even a file in her office, the entries in which she had not made and for the correctness of which neither the witness nor anyone else could vouch, were properly stricken.—*State v. Gaimos*, 118.

Witnesses—Impeachment—Prerequisites.

9. Before a witness can be impeached, the circumstances of time, place, persons present and languages used must, under section 8025, Revised Codes, be called to his attention.—*State v. Gaimos*, 118.

Criminal Law—Evidence of Other Acts—Admissibility.

10. Though evidence of other acts of like character to that charged in an information for rape is admissible to show the intimate relationship existing between the prosecutrix and the defendant, for the purpose of corroboration, the commission of an independent crime cannot be thus shown.—*State v. Gaimos*, 118.

Trial—Exceptions—Scope.

11. Where an exception to the introduction of evidence has once been saved, it is saved for all purposes unless thereafter waived.—*Ferrat v. Adamson*, 172.

Hearsay.

12. Evidence of a conversation between defendant constable and the attorney for a person not a party to the action being tried was hearsay. *Ferrat v. Adamson*, 172.

Larceny—Livestock—Brands—Variance.

13. After a horse had been identified by color, weight, brand and other distinguishing marks, as described in the information, evidence that the animal bore another brand did not constitute a fatal variance. *State v. Collins*, 213.

Negligence—Circumstantial Evidence—When Sufficient.

14. Where circumstantial evidence is relied on to establish actionable negligence, the circumstances must tend directly to establish the cause of action; where they have an equal or stronger tendency to support some other theory inconsistent with the one upon which plain-

tiff relies, the burden resting upon him is not satisfied.—Fusselman v. Yellowstone V. L. & I. Co., 254.

Searches and Seizures—Constitutional Guaranties.

15. The admission in evidence, without defendant's consent, of a letter taken from his private papers, access to which was obtained by keys obtained from his person by officers, did not deprive defendant of his constitutional rights to be secure from unreasonable searches and seizure, and to not be compelled to testify against himself.—State v. Reed, 292.

Letters—Hearsay Evidence.

16. Letters describing and characterizing the place to which a girl was sought to be transported for immoral purposes were inadmissible as hearsay.—State v. Reed, 292.

Opinion Evidence—When Improper.

17. The character of a place to which a girl was attempted to be transported for immoral purposes was not susceptible of proof by expert testimony in the form of opinions.—State v. Reed, 292.

Contracts in Writing—Parol Evidence—Admissibility.

18. In a suit to rescind a written contract for the sale of land for fraud inducing it, the rule that a writing cannot be varied by parol does not apply.—Petit v. Sinclier, 317.

Variance—What is not.

19. In suit for rescission of a written contract stipulating for a conveyance by defendant of a right to 150 cubic inches of appropriated water per second of the waters of a creek used in connection with the irrigation of defendant's land, evidence tending to show that defendant possessed no such right was not inadmissible as an attempt to vary the terms of a writing.—Petit v. Sinclier, 317.

General Denial—Evidence—Admissibility.

20. Evidence of any fact which is inconsistent with, and thus negatives, plaintiff's cause of action, is admissible under a general denial.—Hanson Sheep Co. v. Bank, 324.

Same.

21. Defendant bank was, under its general denial, properly permitted to show that a balance appearing on plaintiff's pass-book had been exhausted by an appropriation made of it by plaintiff through the means of checks which had been paid by his direction.—Hanson Sheep Co. v. Bank, 324.

Criminal Law—Witnesses—Competency—Husband and Wife.

22. Under amended section 9483, Revised Codes (Laws 1915, Chap. 111), a wife was competent to testify in a prosecution against her husband for attempted murder.—State v. Rains, 424.

Reformation of Instruments—Evidence—*Quantum* of Proof.

23. The rule that to warrant reformation of an instrument for mistake, the evidence must be clear, convincing and satisfactory, refers to the quality, rather than the quantity, of proof.—Parchen v. Chessman, 430.

Same—Evidence—*Quantum* of Proof.

24. To warrant reformation of an instrument for mistake, it is not necessary that the mistake be made to appear beyond a reasonable doubt or by any *quantum* of proof beyond a bare preponderance (Rev. Codes, sec. 8028), which preponderance may be established by the testimony of a single witness as against a greater number of witnesses who testify to the contrary (sec. 7861).—Parchen v. Chessman, 430.

Equity—Credibility of Witnesses.

25. In an equity case, the determination of the trial court on the credibility of a witness cannot be interfered with, unless his testimony is characterized by such inherent improbability as in effect to destroy it. *Parchen v. Chessman*, 430.

Criminal Law—Hearsay Testimony—Harmless Error.

26. Erroneous admission in evidence of hearsay statements that defendant, charged with the theft of cattle, claimed ownership of them, held harmless where he asserted in defense that he owned the animals and undertook to establish such claim by his own testimony as well as by that of others.—*State v. Brodock*, 463.

Compromise Offer—Inadmissibility in Evidence.

27. A compromise offer is inadmissible in evidence against the party making it.—*Huffine v. Lincoln*, 474.

Written Contracts—Ambiguity—Evidence.

28. It is only where the terms of a written agreement are not clear and free from ambiguity that recourse may be had to the attendant circumstances in explanation of the intention of the party; one which clearly and explicitly expresses such intention is not in need of interpretation.—*Brockway v. Blair*, 531.

Elections—Residence—Declarations—Admissibility.

29. The residence of a voter is to be determined from his acts and intent; it may be established by circumstantial evidence, as well as by his declarations touching the subject, if a part of the *res gestae*, or if made in disparagement of his right to vote at or before the election.—*Sommers v. Gould*, 538.

Same—Correctness of Returns—Evidence.

30. Until impeached, election returns furnish *prima facie* evidence of their correctness.—*Sommers v. Gould*, 538.

Letters—Authentication.

31. Where letters offered in evidence were not shown to have been signed by their purported authors or identified as genuine, they were inadmissible for any purpose.—*Buhler v. Loftus*, 546.

Partial Judicial Record from Other States—Inadmissibility.

32. The admission of fragments of a judicial record from another state in evidence, neither disclosing the issues made by the pleadings nor tending to show what was adjudicated by the final judgment, was error.—*Buhler v. Loftus*, 546.

EXCEPTIONS.

Duty of district court,—see *District Court*, 4.

In criminal statute—Necessity of negating in information,—see *Criminal Law*, 54.

To evidence—Scope,—see *Pleading and Practice*, 4.

EXECUTORS AND ADMINISTRATORS.**Prompt Administration of Estates—Policy of Law.**

1. It is the policy of the law that estates be administered with dispatch, to the end that they shall not be wasted by needless expense incident to delay and the continuation of allowances, to the injury of creditors and those entitled to have distribution made to them.—*In re Dolenty's Estate*, 33.

Unauthorized Disposition of Property.

2. Where the district court had granted an executrix authority to sell personal property of the estate for cash, she was without power to turn over a portion of it to one for services alleged to have been rendered in keeping her accounts, and was properly chargeable with such property as part of the assets of the estate.—In re Dolenty's Estate, 33.

Duties of Executors and Administrators.

3. Under section 7628, Revised Codes, an executor or administrator is chargeable not only with the assets of the estate which actually came into his hands, but also with those—including rents and profits of real estate which in the exercise of ordinary care and diligence ought to have been received from it—which by reason of his neglect he has failed to get into his hands.—In re Dolenty's Estate, 33.

Same—Liability for Loss—Burden of Proof.

4. The burden of showing that an estate has apparently suffered loss through the neglect of an executor or administrator is upon the heir or creditor who seeks to charge him with the loss.—In re Dolenty's Estate, 33.

Reports of Condition—Duty of Executors and Administrators.

5. An executor or administrator, when called upon by the district court, on the petition of creditors, to make report of the condition of the estate in his hands, must make full disclosure to enable the court to determine whether diligence was exercised in collecting its assets, its value, whether insolvent or not, etc.—In re Dolenty's Estate, 33.

Removal, When.

6. Since an estate is an entirety and there can be but a single administration of it, a special administrator may not, during the incumbency of the executrix, be appointed to litigate the question of title to real property claimed by creditors to be part of the estate and by her in her own right; under such circumstances she should be removed, inasmuch as she cannot bring action against herself and someone appointed in her place to try the question of title. (See, also, Opinion on Motion for Rehearing.)—In re Dolenty's Estate, 33.

Void Sale of Property—Effect.

7. Where sales of real property belonging to an estate had been declared void, the property remained property of the estate, so that, upon the rendition of an account, the executrix should not have been permitted to charge herself with the proceeds thereof, but was chargeable with the realty itself.—In re Dolenty's Estate, 33.

Removal—Determination of Title.

8. Merely because it is the policy of the law that the surviving husband or wife shall administer the estate of the decedent spouse is no reason why he or she should not be removed, even though the sole beneficiary, where, because of the threatened insolvency of the estate, the rights of its creditors are imperiled by the neglect or inattention of the one in charge of it.—In re Dolenty's Estate, 33.

Same—Right to Nominate Successor.

9. Though a surviving spouse has the right to nominate someone to serve in his or her stead in the administration of the decedent's estate, no such right exists, upon removal for misconduct or for the purpose of permitting trial of an assertion of rights adverse to the estate, since the successor so named would more than likely be biased in favor of the adverse claim.—In re Dolenty's Estate, 33.

Liability for Services of Attorneys.

10. As a general rule, the personal representative of an estate is individually liable for services performed by attorneys for its benefit, at his special instance and request.—Wight v. Dolenty, 168.

Same—Fees—Liability of Estate—Evidence—Insufficiency.

11. Conceding (but not deciding) that by special agreement between an attorney and the personal representative of an estate, individual liability of the latter may be obviated, *held* that in an action to recover attorneys' fees from the executrix of an estate, the evidence was insufficient to show such an agreement.—Wight v. Dolenty, 168.

Employment of Counsel.

12. The employment of counsel by an administrator is a personal matter, and creates no relation between the attorney and the estate.—State ex rel. Cohen v. District Court, 210.

Attorneys' Fees—Recovery Back—Probate Courts—Jurisdiction.

13. Where an administrator expends funds of the estate in his charge for the employment of counsel, and the probate court refuses to make allowance therefor, he or his bond must make good; but the estate cannot demand of, nor can the court while sitting in probate order, the attorney to return such funds without a jury trial of the issues presented in a proper civil action, upon the necessity and value of the services.—State ex rel. Cohen v. District Court, 210.

Same.

14. Funds of an estate expended by the administrator for attorney's fees are not recoverable on the theory that the attorney—a stranger—has property of the estate in his possession for which he may be called to account under sections 7505 and 7506, Revised Codes; the jurisdiction of the court sitting in probate under these provisions extending no further than to require the accused to appear and submit to an examination, it having no power to adjudge rights which may be asserted or involved.—State ex rel. Cohen v. District Court, 210.

FARM LOANS.**Validity of Act—Constitution—Enabling Act.**

1. The Farm Loan Act (Laws 1915, p. 486), so far as it provides (secs. 1, 2, 5) a method of procedure under which the state board of land commissioners may invest common school and other specified state funds in first mortgages on good, improved farm lands in the state, and for foreclosure thereof in case of default in the payment of interest thereon, *held* proof against attack on constitutional ground, and not to conflict with the Enabling Act.—State ex rel. Evans v. Stewart, 18.

State Funds—Investment—Power of Legislature.

2. Since the Constitution makes no reference to the investment of the reform school, deaf and dumb asylum and capitol building funds, the legislature could prescribe such regulations as it saw fit touching that subject.—State ex rel. Evans v. Stewart, 18.

Power of Legislature.

3. Under its power referred to in paragraph 2 above, that conferred by section 12, Article XI, of the Constitution with relation to funds belonging to the higher educational institutions, which is to be exercised under such regulations "as may be prescribed by law," and that contained in section 1, of the same Article, as to the permanent public school funds to be invested "under the restrictions to be provided by law," the legislature could in the Farm Loan Act, properly exclude county, city and town bonds, as well as warrants and school district bonds not constituting the only outstanding issue, from the list of

securities available for the investment of such funds.—State ex rel. Evans v. Stewart, 18.

Investment of State Funds—Duty of State Board of Land Commissioners.

4. *Held*, that the state board of land commissioners must, in the investment of the funds mentioned in the Farm Loan Act, after having given preference to the public securities enumerated, employ the residue in the other securities named, including first mortgages upon good, improved farm land in the state.—State ex rel. Evans v. Stewart 18.

State Board of Land Commissioners—Implied Powers.

5. Failure of the Farm Loan Act to provide the working details of the plan *held* valid (see paragraph 1 above), is not sufficient to declare it invalid, since whatever authority is necessary in the state land board to execute the commands of the Act is, in the absence of specific direction, conferred by implication, matters of detail—such as the fixing of the rate of interest, *etc.*—being left to the whole discretion of the board for control by appropriate rules or regulations.—State ex rel. Evans v. Stewart, 18.

Invalid Provisions—Counties—Loaning Credit.

6. *Held*, that that portion of the Farm Loan Act which seeks to commit to the several counties exclusive authority to loan the funds mentioned therein on farm mortgage security, each county being constituted a statutory guarantor of loans made, any loss to be repaid out of its common revenues, is repugnant to constitutional provisions (Const., Art. XI, secs. 3, 12; Art. XII, sec. 11; Art. XIII, secs. 1, 5), and that since these provisions apparently formed an inducement to the legislature to provide this method of making farm loans, the plan is inoperative.—State ex rel. Evans v. Stewart, 18.

What Part of Act Enforceable.

7. Under the rule that if, after disregarding the unconstitutional portion of an Act, the remainder is complete in itself and capable of being executed in accordance with the apparent legislative intent, it will be sustained, *held* that the Farm Loan Act, so far as declared valid (see paragraph 1 above), is complete and independent of that part of the Act rejected (see paragraph 6 above), and therefore enforceable.—State ex rel. Evans v. Stewart, 18.

FEEES.

Attorney's fee in election contest,—see Elections, 6–9.

“Illegal fees,”—Removal of officers for receiving,—see Office and Officers, 6–13.

FENCES.

See Railroads, 2, 3.

FINDINGS.

Immateriality,—see Attorney and Client, 4.

When conclusive,—see Appeal and Error, 24.

Equity Cases—Insufficient Evidence—Review.

1. The appellant in an equity case claiming that the evidence is insufficient to sustain the court's findings has the burden of showing that it preponderates against them.—Robitaille v. Boulet, 66.

When Immaterial.

2. A finding not responsive to any issue involved in the case is immaterial.—Walsh v. Hoskins, 198.

Equity—Appeal—Power of Supreme Court.

3. In an equity suit in which the evidence is all before the supreme court, it may, under section 6253, Revised Codes, determine a fact on which the trial court failed to make a finding.—Walsh v. Hoskins, 198.

Incompetent Evidence—Presumptions.

4. The presumption obtains that the trial court in making its findings in an equity case, after argument by counsel, considered only so much of the evidence as was competent and substantially material, rejecting such as ought to have been rejected.—*Buhler v. Loftus*, 546.

FORMER CONVICTION.

See Criminal Law, 25, 29, 30.

FRAUD.

See, also, Cancellation of Instruments, 1-7; Pleading and Practice, 15-23. Rescission for fraud,—see Contracts, 6-9.

Corporations—Power of Courts.

1. The rule that the legal capacity of a corporation cannot be inquired into collaterally by a private person in a controversy between it and him does not preclude courts to examine into the facts of a particular case to determine the identity of a person who uses the name of a corporation for his own purposes, and to fix liability upon him for the ostensible corporate acts.—*Hanson Sheep Co. v. Farmers and Traders' State Bank*, 324.

GENERAL DENIAL.

Evidence admissible under,—see Evidence, 20, 21.

GRAND LARCENY.

See Larceny.

HARMLESS ERROR.

See Appeal and Error, 6, 8, 9, 21; Criminal Law, 35, 51; Instructions, 4.

HEIRSHIP.

See Wills, 1, 2.

HIGHWAYS.

Automobile accident—Law of the road,—see Personal Injuries, 21, 22.

HOMICIDE.

See Criminal Law, 40-50.

HORSE-RACING.

See Criminal Law, 11, 12.

HUSBAND AND WIFE.

Competent witness, one against the other,—see Criminal Law, 45.

Custody of minor children,—see Divorce, 1-5.

INDEBTEDNESS.

See Cities and Towns, 4-10; Counties, 9-11.

INDICTMENTS AND INFORMATION.

Amendment during trial,—see Criminal Law, 35.

Indorsement of names of witnesses,—see Criminal Law, 14.

Grand Larceny—Livestock—Sufficiency,—see Criminal Law, 27.

See, also, Criminal Law, 33, 41, 44.

INFANTS.

See Minors.

INITIATIVE AND REFERENDUM.

See Constitutional Law, 1.

INJUNCTION.

See, also, Labor Unions.

Pendente Lite—Discretion.

1. An application for a temporary injunction order is addressed to the sound legal discretion of the trial court, and unless it is made to appear that such discretion was abused, the order will be approved on appeal.—Postal Telegraph-Cable Co. v. Nolan, 129.

Same—Purpose.

2. The purpose of an injunction *pendente lite* is to maintain the *status quo* until the relative rights of the parties can be determined by a trial on the merits.—Postal Telegraph-Cable Co. v. Nolan, 129.

Same—Burden of Proof.

3. To secure an injunction *pendente lite* the party applying for it has the burden of establishing a *prima facie* right to the relief.—Postal Telegraph-Cable Co. v. Nolan, 129.

Same—Telegraph Lines—Improper Refusal.

4. Where a telegraph company had been in the actual occupancy, as a right of way for its telegraph line, of a strip of ground over public lands before location thereof as a placer mining claim, and an interruption of its business would cause public interests to suffer, equitable interference by injunction was proper to restrain the owners from destroying the line pending determination of eminent domain proceedings instituted by the company to condemn the right of way.—Postal Telegraph-Cable Co. v. Nolan, 129.

Same—Trespass—Implied Admission—When Refusal Error.

5. The apparently implied admission in plaintiff company's complaint seeking condemnation of a right of way of the ground covering which it had been in actual occupancy for about twelve years before, that it was a trespasser, *held* not to have been sufficient reason for refusal of a temporary injunction, where there was some evidence that its original entry was made under some color or claim of right.—Postal Telegraph-Cable Co. v. Nolan, 129.

Same—Trespass—When Refusal of Relief not Error.

6. Refusal of an injunction to restrain owners of a mining claim from interfering with a telegraph company pending its suit to condemn a strip of ground over the claim for its pole line was not an abuse of discretion, where it appeared that the company had, after location of the ground as a placer claim by defendants, erected its line upon the ground without the knowledge or consent of the owners, and had made no offer of compensation therefor.—Postal Telegraph-Cable Co. v. Nolan, 129.

Constitution—Freedom of Speech.

7. Since under section 10, Article III, of the state Constitution, one may publish what he pleases, subject only for penalty for abuse of such discretion, he cannot be prevented from doing so by injunction.—Empire Theatre Co. v. Cloke, 183.

Labor Unions—Boycott—Nuisances.

8. In a suit to enjoin labor unions from conducting a boycott against plaintiff's theater, from picketing the same by men carrying banners

and dissuading patrons from entering, findings of the trial court *held* insufficient to warrant the issuance of a writ of injunction on the ground that the acts complained of constituted a nuisance within the meaning of section 6162, Revised Codes.—*Empire Theatre Co. v. Cloke*, 183.

Cities and Towns—Indebtedness—Taxpayer's Suit.

9. The interest a taxpayer has in a proposed city bond issue is sufficient to entitle him to bring suit to enjoin the expenditure of public funds if the city threatens to make unlawful use of them.—*McClintock v. City of Great Falls*, 221.

***Pendente Lite*—Orders of Railroad Commissioners—Power of District Court.**

10. *Held*, that the district court has jurisdiction to use the provisional remedy of injunction *in limine* to suspend an order, made and promulgated by the board of railroad commissioners, requiring a railroad company to operate a local passenger train each way daily between designated stations, pending a final determination of an action brought by the company to have the order reviewed as unjust and unreasonable.—*State ex rel. Board of Railroad Commrs. v. District Court*, 229.

Same—Discretion.

11. An injunction does not issue as a matter of right in any case. The granting of it is discretionary; the discretion, however, is not arbitrary, but must be guided by conclusions based upon the law and facts of the particular case, and unless a case is presented certain as to both, the relief should be withheld.—*State ex rel. Board of Railroad Commrs. v. District Court*, 229.

INNOCENT PURCHASERS.

See Contracts, 12.

INSTRUCTIONS.

See, also, Criminal Law, 12, 23, 30, 36, 40, 42, 43, 44, 52.

Immaterial Modification.

1. In an action for breach of a contract to feed sheep where plaintiff alleged defendant's delay in constructing yards and corrals, the substitution of "reasonable" for "reasonably short" in an instruction, with reference to the time in which the construction should be completed, was not error.—*Rea v. Alfalfa Products Co.*, 90.

Offered Instruction—Proper Refusal.

2. An offered instruction based on facts not shown by the evidence was properly refused.—*Rea v. Alfalfa Products Co.*, 90.

Horse-races—Betting—Transmitting Information—Precautionary Instruction.

3. Since the offense denounced by Chapter 55, Laws of 1915, consists in transmitting information concerning a horse-race for the purpose of having bets or wagers made, an instruction should be given in a prosecution for such an offense that it is not wrongful to transmit such information if bets or wagers are not to be made.—*State v. Postal Tel. C. Co.*, 104.

Rape—Harmless Error.

4. Where prosecutrix had testified to two acts of intercourse, one on the date named in the information and another on a previous day, an instruction that it was not necessary for the state to prove the date of the alleged offense precisely as charged in the information

was not prejudicial in view of a further instruction that evidence of other acts than the one charged was admissible only for the purpose of corroboration.—*State v. Gaimos*, 118.

Conversion—Measure of Damages—Erroneous Instruction.

5. In an action in conversion, the giving of an instruction submitting to the jury the measure of damages declared by section 6068, Revised Codes, is error, the rule thus established being inapplicable to such a case.—*Ferrat v. Adamson*, 172.

Same—Measure of Damages—Proper Instructions.

6. In an action in conversion, the measure of damages established by section 6071, Revised Codes, is controlling, unless special damages are pleaded and proved, in which event correct practice requires an instruction so supplementing the measure pointed out by said section as to allow such additional damages as may be warranted by the circumstances of the particular case.—*Ferrat v. Adamson*, 172.

Same—Punitive Damages—Argumentative Instructions.

7. Where the court had adequately covered the subject of punitive damages, it was improper to give an argumentative instruction that, if defendant constable levied upon the property "in a high-handed way to oppress plaintiff" with malicious purpose, the jury could in its discretion award punitive damages.—*Ferrat v. Adamson*, 172.

Grand Larceny—Prior Conviction.

8. Where the information charged grand larceny after previous conviction, but no evidence of the previous conviction had been introduced, it was proper to instruct the jury to disregard the allegation of prior conviction, and, if they found defendant guilty, to fix his punishment as for a simple larceny.—*State v. Collins*, 213.

Criminal Law—"Immoral Purposes"—Reversible Error.

9. An instruction defining "immoral purpose" as used in section 2 of the Donlan Act, (Laws 1911, Chap. 1), as "one which is violative of conscience or moral law inconsistent with purity, rectitude or good morals, or hostile to the welfare of the general public," *held* prejudicially erroneous.—*State v. Reed*, 292.

Criminal Law—Refusal of Correct Instruction—When not Error.

10. Refusal of a correct instruction on the subject of felonious intent in a prosecution for larceny was not error, where the court had fully covered the matter by appropriate instructions given.—*State v. Wiley*, 383.

Same—Larceny and Grand Larceny—Instructions.

11. The substantive crime alleged in an information charging the theft of a horse—under section 9324, Revised Codes, made grand larceny without reference to value—being larceny, instructions defining larceny as well as grand larceny were not open to the objection that different definitions of the same offense—some of which inapplicable to the facts of the case—were thus submitted.—*State v. Wiley*, 383.

Same—"Recent Possession" of Stolen Property.

12. The words "recent possession," used in an instruction advising the jury relative to the probative value of recent possession of stolen property, *held* to refer to possession in defendant soon after commission of the larceny, and not to possession immediately before the information is filed or a trial had.—*State v. Wiley*, 383.

Same—Principal and Accessory.

13. Instructions substantially in the words of sections 8119 and 9167, Revised Codes, defining a principal and telling the jury that the distinction between a principal and an accessory had been abrogated by statute, were not improper as implying that a felony had been committed.—*State v. Wiley*, 383.

Criminal Law—Settlement of Instructions—Review—Record on Appeal.

14. Under section 9271, Revised Codes, to entitle appellant in a criminal action to a review of an instruction given, the record must disclose that at the time of settlement of the instructions he made suitable objection and reserved an exception thereto.—*State v. Brodock*, 463.

Appeal and Error.—Briefs.

15. Alleged error in instructions given or refused is not entitled to consideration on appeal, unless the instruction is set out in full in appellant's brief.—*Brockway v. Blair*, 531.

To be Construed as a Whole.

16. All the instructions to the jury constitute the charge of the court; each paragraph must be read and considered with the context; no one of them may be segregated from the rest and urged as erroneously given.—*Brockway v. Blair*, 531.

Brokers—Commissions—Correct Instruction.

17. In an action to recover commissions on sales of automobiles, under a contract the terms of which permitted plaintiff to call for assistance from defendant if necessary to complete a sale, the court correctly instructed the jury that the former was entitled to his commissions if his endeavors were the moving cause or "instrumental" in making the sales, even though he was assisted by one of defendant's demonstrators in finally consummating them.—*Brockway v. Blair*, 531.

INTERSTATE COMMERCE.

See Railroads, 1, 2.

INTOXICATING LIQUORS.**Local Option Election—Petition—Qualifications of Signers.**

1. Whether a signer of a petition for a local option election is a taxpayer must be determined by an inspection of the last assessment-roll; and whether he is a qualified elector—the other qualification required by section 2041, Revised Codes—the board of county commissioners may ascertain, in the absence of any statutory direction on the subject, from any competent source of information, including the official register of voters, the testimony of witnesses, and, perhaps, the personal knowledge of the individual members of the board.—*State ex rel. Fadness v. Eie*, 138.

Same.

2. The assessment-roll upon which the names of the signers of a petition for a local option election must appear to render them competent is the last completed roll, i. e., the roll upon which the amount due from each taxpayer appears after both county and state boards of equalization have acted.—*State ex rel. Fadness v. Eie*, 138.

Same—Mandamus—When Proper Relief.

3. Where a board of county commissioners, by filing a general demurrer and motion to quash, admitted that in passing upon the sufficiency of a petition for a local option election it had wrongfully eliminated from it the names of a number of qualified persons sufficient to defeat the petition, the presumption that its official duty had been legally performed disappeared, and relief by way of *mandamus* was proper.—*State ex rel. Fadness v. Eie*, 138.

Same—Supplemental Petitions may be Filed.

4. Held that in addition to the petition mentioned in section 2041, Revised Codes, as requisite for the calling of a local option election, supplemental petitions may be filed at any time during the course of

the board's deliberations until the matter is submitted for final decision.—State ex rel. Fadness v. Eie, 138.

Same—Petition—Revocation of Withdrawal of Names—*Mandamus*.

5. The right to revoke his withdrawal from a petition calling for a local option election—thus restoring the signer to his original position—is not absolute, and should not be enforced by *mandamus*.—State ex rel. Fadness v. Eie, 138.

When License cannot be Collected.

6. Though a retail liquor dealer who engages in business without procuring a license may be prosecuted under the criminal law, the state cannot by civil action collect the amount of the license from one who, after refusal to issue one to him because the maximum number of licenses allowed by law in the town in which he intends to conduct a saloon has been reached, does business notwithstanding such refusal.—State ex rel. Carter v. Kall, 162.

JEOPARDY.

Availability of defense,—see Criminal Law, 15, 16.

Jury question,—see Criminal Law, 21.

JUDGMENTS.

Collateral attack,—see Adoption, 2, 3.

Entry,—see Clerk of District Court, 1-3.

On moot question,—see Certiorari, 3.

When supreme court cannot, on appeal, direct judgment,—see Appeal and Error, 5.

Who may Attack for Fraud.

1. To avoid a judgment for fraud, the person attacking it must show that he has rights which were vested at the time it was rendered and were injuriously affected by it; for rights accruing after its rendition, attack on it may not be made.—In re Pepin's Estate, 240.

Adoption—Fraud—Coercion—Who may not Attack Decree.

2. One who had no right in the estate of a decedent other than as collateral heir, was not in a position to attack a decree of adoption twelve years after its rendition, for fraud or coercion said to have been practiced upon decedent by the parents of the child adopted.—In re Pepin's Estate, 240.

JURISDICTION.

Claims against county—Appeal,—see District Courts, 2.

Probate,—see District Courts, 1; Executors and Administrators, 13, 14.

Of justices of the peace,—see Justices of the Peace, 1, 2.

Over orders of board of railroad commissioners,—see Injunction, 10.

Legislative seat—Supreme court,—see Quo Warranto, 1.

JURY.

Challenges,—see Criminal Law, 25, 26.

JUSTICES OF THE PEACE.

Service of Summons—Residence of Defendant.

1. *Held*, under section 6986, Revised Codes, that in the absence of a showing that defendant in an action in a justice of the peace court

of L. & C. county could not be found and served with summons in B. county, where the action against him accrued and the county of his residence, service of summons in L. & C. county was void, and did not confer jurisdiction upon the justice to try the cause.—*Wilcox v. Toston State Bank*, 490.

Want of Jurisdiction—Waiver.

2. Defendant, in an action in a justice of the peace court, did not waive objection to want of jurisdiction over his person, by presenting an answer containing a counterclaim, where he insisted at every stage of the proceedings that the justice did not have jurisdiction.—*Wilcox v. Toston State Bank*, 490.

LABOR UNIONS.

Right to Boycott.

1. Labor unions are lawful; they may publish and pursue a peaceful boycott against any person or enterprise deemed by them to be unfriendly, and a combination of such unions or their members cannot be deemed a conspiracy.—*Empire Theatre Co. v. Cloke*, 183.

Same—Threats.

2. Generally speaking, what one may lawfully do, one may give warning of an intention to do, without being chargeable with making threats. *Empire Theatre Co. v. Cloke*, 183.

Same—Injunction.

3. The action of labor unions in warning the public and persons in sympathy with them, through means of a banner carried upon the streets and immediately in front of the premises of the person against whom they seek to enforce a peaceable boycott, that such person is unfair to organized labor, may not be enjoined as a threat or intimidation to others or a deprivation of personal liberty.—*Empire Theatre Co. v. Cloke*, 183.

Lawful Combinations—Conspiracy.

4. A combination to do a lawful thing by lawful means is not a conspiracy, irrespective of the character, numbers or influence of the members or the consequences which may follow.—*Empire Theatre Co. v. Cloke*, 183.

Boycott—Injunction—Nuisances.

5. In a suit to enjoin labor unions from conducting a boycott against plaintiff's theater, from picketing the same by men carrying banners and dissuading patrons from entering, findings of the trial court held insufficient to warrant the issuance of a writ of injunction on the ground that the acts complained of constituted a nuisance within the meaning of section 6162, Revised Codes.—*Empire Theatre Co. v. Cloke*, 183.

LACHES.

See Attorney and Client, 6; Deeds, 3-7.

LANDLORD AND TENANT.

Failure to Repair—Personal Injuries—Liability of Landlord.

1. Sections 5226 and 5227, Revised Codes, providing that a lessor of a building intended for human occupation must put it in condition therefor, and repair subsequent dilapidations, and if, after reasonable notice, he neglects to do so, the lessee may repair and deduct the expenses from rent, or vacate without liability for rent, gives no right of action for personal injuries to a tenant caused by failure to repair. *Dier v. Mueller*, 288.

LARCENY.

See Criminal Law, 26-31, 42, 44, 51-53.

LAW OF CASE.

See Appeal and Error, 12, 23.

LEGISLATURE.

See Constitution; Statutes and Statutory Construction; Quo Warranto.

LICENSES.

Practicing without license,—see Osteopathy, 1, 2.

See Intoxicating Liquors, 6.

LIENS.

Of attorneys,—see Attorney and Client, 3-7.

See, also, Mechanics' Liens; Mortgages.

LIVESTOCK.

Driving from accustomed range,—see Criminal Law, 6-8.

Killing of by railroads,—see Railroads, 2, 3.

Larceny,—see Criminal Law, 25-30.

LOCAL OPTION.

See Intoxicating Liquors.

LOGGING.

Railroad,—see Personal Injuries, 1, 2.

MANDAMUS.

New Counties—Apportionment of Indebtedness.

1. *Mandamus* is the proper remedy to compel commissioners appointed to adjust county indebtedness between an old and a new county to reassemble and correctly apportion such indebtedness; the fact of their adjournment being immaterial.—State ex rel. Furnish v. Mullendore, 109.

Same—Parties.

2. *Mandamus* proceedings to compel commissioners to correctly apportion the indebtedness between an old and new county should be brought in the name of the county, and not by the board of county commissioners in their official capacity.—State ex rel. Furnish v. Mullendore, 109.

Demurrer—Admissions.

3. The allegations of fact in an affidavit for a writ of mandate will, as against a general demurrer and motion to quash, be taken as true on appeal.—State ex rel. Fadness v. Eie, 138.

Local Option Election—When Proper Relief.

4. Where a board of county commissioners, by filing a general demurrer and motion to quash, admitted that in passing upon the sufficiency of a petition for a local option election it had wrongfully eliminated from it the names of a number of qualified persons sufficient to defeat the petition, the presumption that its official duty had been legally performed disappeared, and relief by way of *mandamus* was proper.—State ex rel. Fadness v. Eie, 138.

Same—Petition—Revocation of Withdrawal of Names—*Mandamus*.

5. The right to revoke his withdrawal from a petition calling for a local option election—thus restoring the signer to his original position—is not absolute, and should not be enforced by *mandamus*.—State ex rel. Fadness v. Eie, 138.

When Writ Available.

6. Where the district court refuses to proceed with the trial of a proceeding because of an erroneous view of a preliminary question of law, *mandamus* lies to get the machinery of the law in motion.—State ex rel. Payne v. District Court, 350.

Order Granting Change of Venue—Impropriety of Remedy.

7. An order granting a motion for change of venue on the ground of residence is a judicial act, which will not be set aside by *mandamus*.—State ex rel. Woodward v. District Court, 358.

MASTER AND SERVANT.

See Personal Injuries, 1, 2, 10–20.

MEASURE OF DAMAGES.

Conversion,—see Instructions, 5–7.

MECHANICS' LIENS.**Statute—Liberal Construction—Rule.**

1. The rule that mechanic's lien laws are remedial, and should be liberally construed and applied, means that, the necessary steps having once been taken to secure the lien, the law is subject to the most liberal construction.—Crane & Ordway Co. v. Baatz, 438.

Affidavit—Insufficiency.

2. A writing attached to an intended mechanic's lien, which contained no jurat or other evidence to show that the claimant made oath before a person authorized to administer oaths, and which did not assume to verify either the description of the property affected or the account, did not constitute such an affidavit as is required by section 7291, Revised Codes.—Crane & Ordway Co. v. Baatz, 438.

MINES AND MINING.**Extralateral Rights—Evidence—Insufficiency.**

1. In an action to recover the value of ore alleged to have been taken by defendants from a vein having its apex within the surface boundaries of the plaintiff's quartz lode claim, and for a perpetual injunction, the latter's testimony consisting of opinions and beliefs that in some way, not made to appear by actual development, the vein did so apex, *held* insufficient to warrant the relief demanded.—Barker v. Condon, 585.

Same—Identity of Vein Prerequisite.

2. In order that a quartz lode vein may be followed extralaterally, identity throughout is essential.—Barker v. Condon, 585.

Quartz Lode Veins—Presumptions.

3. In the absence of a contrary showing, the presumption obtains that a vein found beneath the surface of one's quartz lode claim will continue to extend upward at the same angle as exhibited below.—Barker v. Condon, 585.

MINORS.

Custody of,—see Divorce, 1–5.

MISTAKE.

See Reformation of Instruments, 1-5.

MOOT QUESTIONS.

Judgment on—Effect,—see Certiorari, 3.

Duty of Courts.

1. Courts will not determine abstract questions of law.—State ex rel. Ford v. Cutts, 300.

MORTGAGES.

Deeds absolute,—see Deeds, 1-7.

Priority of mortgages,—see Contracts, 11.

Chattel Mortgages—Failure of Ownership—Effect.

1. Where a buyer, in anticipation of a sale, gave a note and mortgage to a bank on the chattels which were the subject matter of the transaction, the consideration being credit at the bank to the seller in the amount of the purchase price, and the bank failed to extend such credit, the sale was incomplete, title remained in the seller and the note and mortgage were void, the latter constituting no obstacle to the enforcement of the lien of a subsequent mortgage given by the owner.—Loud v. Hanson, 445.

Same—Possession—Estoppel.

2. Where, at the time chattels were sought to be mortgaged to a bank, their possession of them in the ostensible mortgagor was no different than it had known it to be for two years prior thereto, to-wit, as manager of the owner, and the bank did not part with value, it was estopped to claim prejudice because of any apparent change of possession.—Loud v. Hanson, 445.

Same—Partial Validity—Effect.

3. A mortgage invalid as to a portion of the property upon which given because not owned by the ostensible mortgagor, and good as to a grain crop, held enforceable as a prior lien upon the crop.—Loud v. Hanson, 445.

MURDER.

See Criminal Law, 46-50.

NEGOTIABLE INSTRUMENTS.

Reformation of Instruments—Bills and Notes—"Renewal."

1. An agreement, for the "renewal" of a note means the substitution of another with the same substantive terms as the old, except as to date of payment and amount.—Parchen v. Chessman, 430.

Same—Mistake of Scrivener—Evidence—Sufficiency.

2. Evidence held sufficient to warrant a finding that a mistake had been made, twenty-one years before date of trial, by a scrivener in drafting a renewal note so as to insert a clause waiving the benefits of the statute of limitations not a part of the original note.—Parchen v. Chessman, 430.

Same—Equity—Power to Decree Reformations.

3. Though, in a given case, a technical "mutual" mistake may not be presented to a court of equity, the mistake having been that of a scrivener in formulating the note sought to be reformed, it will nevertheless correct the writing so as to make it express the real agreement of the parties.—Parchen v. Chessman, 430.

Non-negotiable Instruments—Assignment.

4. Where a note and a mortgage securing it were transferred by assignment, the payee indorsing the note without recourse, the transferee took it with full knowledge that it was a mortgage note, collectible under section 6861, Revised Codes,—a non-negotiable instrument subject to all the equities existing in favor of the maker.—*Buhler v. Loftus*, 546.

NEW COUNTIES.

See Counties.

NEW TRIAL.

Affirmance of order granting,—see Appeal and Error, 1.

Newly Discovered Evidence—Affidavit—Insufficiency.

1. An affidavit on motion for new trial asked for on the ground of newly discovered evidence, expressing a belief that additional evidence might be secured and a hope that if a retrial should be granted, such evidence would be forthcoming, the persons from whom such evidence was expected refusing to make affidavits, *held* insufficient.—*State v. Gaimos*, 118.

Order—Affirmance, When.

2. An order sustaining a motion for new trial general in terms will be approved if it can be justified upon any one of the several grounds upon which it is made.—*Reynolds v. Jones*, 251.

Same—Insufficiency of Evidence—Discretion.

3. Where abuse of discretion on the part of the district court in granting a new trial on the ground, among others, of insufficiency of the evidence to justify the verdict, is not shown, it will stand affirmed. *Reynolds v. Jones*, 251.

Newly Discovered Evidence—When Insufficient.

4. One moving for a new trial on the ground of newly discovered evidence, must in his affidavit show that he exercised due diligence before trial to procure the newly discovered evidence by stating the particular efforts he made in that regard; the bare statement that he made due inquiry being insufficient.—*Fusselman v. Yellowstone V. L. & I. Co.*, 254.

Order General in Terms—Affirmance, When.

5. An order general in terms granting a motion for new trial will be affirmed if it can be justified upon any one of the statutory grounds assigned in the motion.—*Rhoades v. Ness*, 322.

Conflict in Evidence—Affirmance.

6. Where the evidence is conflicting, the granting or refusal of a new trial is within the sound legal discretion of the trial court.—*Rhoades v. Ness*, 322.

Newly Discovered Evidence—Compromise Offer.

7. Since, under Revised Codes, section 8040, a compromise offer is inadmissible in evidence against the party making it, a new trial cannot be granted upon the ground of newly discovered evidence consisting of such an offer.—*Huffine v. Lincoln*, 474.

Same—When Denial Proper.

8. Newly discovered evidence relied on for a new trial must be so substantial in character that it would probably produce a different result on another trial; if not of this character, a court may not be held guilty of abuse of discretion in denying a new trial.—*Huffine v. Lincoln*, 474.

NOTICE.

See, also, Tax Deeds, 1, 2.

Attorney's lien,—see Attorney and Client, 3, 7.

Of withdrawal of stock subscription,—see Corporations, 13.

NUISANCES.

Boycott—Injunction,—see Labor Unions, 5.

OBITER DICTUM.

Definition,—see Appeal and Error, 11.

OFFICE AND OFFICERS.

Who is a public officer,—see Quo Warranto, 3-5.

County Offices—Vacancies—Appointment—Constitution.

1. The vacancies in county offices referred to in the last clause of section 5, Article XVI, of the state Constitution, the appointees to fill which shall hold until the next succeeding general election, are those occurring after the fixed term has commenced, but before a general election; and no appointment holds good beyond the next succeeding general election, whether the interval between it and the fixed term be great or small.—State ex rel. Dunne v. Smith, 341.

Same—County Commissioners—Anticipating Vacancy—Void Appointment.

2. An outgoing board of county commissioners may not, by anticipation, fill a vacancy in a county office which will not arise until the incoming one shall take office.—State ex rel. Dunne v. Smith, 341.

Same—Case at Bar.

3. S., the incumbent of the office of county assessor, was re-elected in November, 1916, qualified for the second term, but died before its commencement. C. S. was appointed to fill the vacancy in the unexpired first term of S. On the first Monday in January 1917—the beginning of S.'s second term, had he lived—the board, whose personnel had changed, appointed D. to fill such latter term. C. S. refused to surrender the office, claiming that under section 5, Article XVI, of the Constitution, she was entitled to hold until the next succeeding general election in 1918. *Held*, on *quo warranto*, that the action of the board of county commissioners was proper, in each instance, and that D. was, and C. S. was not, entitled to the office.—State ex rel. Dunne v. Smith, 341.

Same—Title to Office—Parties.

4. Title to office cannot be tried in proceedings to which the incumbent is not a party.—State ex rel. Dunne v. Smith, 341.

Same—Official Acts—Collateral Attack.

5. The acts of an officer done *colore officii* are proof against collateral attack.—State ex rel. Dunne v. Smith, 341.

Removal of Officers—"Illegal Fees."

6. *Held*, on *mandamus*, that the word "fees," as used in section 9006, Revised Codes, providing for the removal of public officers for collecting "illegal fees," is broad enough to comprehend both *per diem* and expenses.—State ex rel. Payne v. District Court, 350.

Same—Accusation—Contents.

7. To constitute the offense of collecting illegal fees, the charge must state that the accused is the incumbent of a public office, that, acting by virtue of his office, he collected certain fees, and that the fees col-

lected were illegal, *i. e.*, not authorized by law.—State ex rel. Payne v. District Court, 350.

Same—What are “Illegal Fees.”

8. Fees are illegal within the meaning of section 9006, Revised Codes, if collected for services never rendered, or never intended to be rendered; if collected for services rendered for which no compensation is allowed by law; or if collected for services at a rate higher than the law allows therefor.—State ex rel. Payne v. District Court, 350.

Same—Accusation—Sufficiency.

9. An accusation charging an officer with collecting illegal fees may be prepared by a layman, and will be held sufficient if it clearly and distinctly sets forth the facts constituting the offense in ordinary and concise language that a person of common understanding may know what is intended.—State ex rel. Payne v. District Court, 350.

Same.

10. An accusation of the character above mentioned is sufficient if it shows upon its face that the fees collected were illegal; a statement that they were illegal, or wherein they were illegal, not being required. State ex rel. Payne v. District Court, 350.

Same—Nature of Proceeding.

11. A proceeding brought for the removal of a public officer under section 9006, Revised Codes, is not a criminal action in the sense that it must be brought in the name of the state, that the public prosecutor must conduct it, or a jury called to try the accused.—State ex rel. Payne v. District Court, 350.

Same—“Illegal Fees”—Definition.

12. *Held*, that “illegal fees,” for the collection of which a public officer may be removed under section 9006, Revised Codes, are any moneys collected or attempted to be collected by a public officer from any source whatever, whether as mileage, *per diem*, or specific charge for service rendered in his office, without authority of law for such collection, though done in good faith and for efficient service performed for the public.—State v. Story, 573.

Same—County Commissioners—Compensation—Statutes.

13. *Held*, further, that the effect of sections 3194 and 2952, Revised Codes, is not to authorize compensation to county commissioners, for attending to business of the county other than meetings of the board, and inspecting and overseeing roadwork, without a previous order of the board, charges for which services are otherwise illegal.—State v. Story, 573.

OFFICIAL BONDS.

Complaint,—see Pleading and Practice, 3.

ORDERS.

See New Trial; State Board of Railroad Commissioners.

OSTEOPATHY.

Practicing Without License—Negating Exception.

1. *Held*, that the proviso in section 1605, subdivision b, Revised Codes, that nothing in the section (defining the practice of osteopathy) shall be construed to restrain or restrict a legally licensed physician or surgeon in the practice of his profession, is not an exception which the state was required to negative in an information, since neither physician nor surgeon can practice osteopathy without first obtaining a license from the board of osteopathy examiners.—State v. Wood, 566.

Same—Temporary Certificate—Information—Sufficiency.

2. *Held*, further, that the provision of section 1597, Revised Codes, that the secretary of the board of osteopathic examiners may, upon examination, grant a certificate to practice osteopathy until the next meeting of said board, when the temporary certificate shall expire, is not an exception, but a matter of defense, hence the state was not required to negative defendant's possession of a temporary certificate.—*State v. Wood*, 566.

PARTIES.

To proceedings to compel commissioners to correctly apportion county indebtedness,—see *Mandamus*, 2.

Counties—Claims Against—Appeal.

1. On appeal from an order of the board of county commissioners allowing or disallowing a claim against the county (Rev. Codes, secs. 2947, 2948), the parties are the county and the claimant, or, in a taxpayer's suit, the county and the objecting taxpayer.—*Albers v. Barnett*, 71.

Wills—Probate—Revocation.

2. Only those who, but for the will, would succeed in some degree to decedent's estate are persons who may seek revocation of probate thereof.—*In re Pepin's Estate*, 240.

Title to Office.

3. Title to office cannot be tried in proceedings to which the incumbent is not a party.—*State ex rel. Dunne v. Smith*, 341.

PEACE OFFICERS.

Powers,—see *Criminal Law*, 1-8.

PERSONAL INJURIES.

Due to failure of landlord to repair premises,—see *Landlord and Tenant*, 1.

Master and Servant—"Railroad"—Logging.

1. *Held*, that the word "railroad" as used in Chapter 29, Laws of 1911, making every person or corporation operating a railroad liable for injuries sustained by employees through the negligence of his or its officers, agents or employees while operating the road, includes a road used for logging purposes.—*Regan v. Montana Logging Co.*, 153.

Same—Operation of Railroad—What Constitutes.

2. Plaintiff, a brakeman on defendant's logging road, was also required to assist in loading and unloading cars; while doing so he was injured by the breaking of an appliance. *Held* that defendant company was "operating" its road at the time of the injury, within the meaning of Chapter 29, Laws of 1911.—*Regan v. Montana Logging Co.*, 153.

Real Property—Trespassers—Duty Owning by Owner.

3. Anyone who goes upon the private property of another without lawful authority or without permission or invitation, express or implied, is a trespasser to whom the owner owes no legal duty, until his presence is discovered, other than to refrain from wanton or willful acts which occasion injury.—*Fusselman v. Yellowstone V. L. & I. Co.*, 254.

Same—Presence upon by Invitation—Duty of Owner.

4. A person upon the private property of another by invitation, express or implied, is there rightfully, and to him the land owner owes the positive duty to exercise reasonable care for his safety.—*Fusselman v. Yellowstone V. L. & I. Co.*, 254.

Same—Turntable Doctrine—Upon What Based.

5. Liability under the doctrine of the turntable cases *held* to be founded upon the theory of implied invitation.—Fusselman v. Yellowstone V. L. & I. Co., 254.

Same—Actionable Negligence—Complaint—Contents.

6. Actionable negligence arises only from a breach of legal duty; and to state a cause of action for damages resulting from negligence, the complaint must disclose, by a statement of facts—not legal conclusions—the duty, a breach and resulting damages.—Fusselman v. Yellowstone V. L. & I. Co., 254.

Same—Turntable Doctrine—What Complaint must Contain.

7. To state a cause of action under the doctrine of the turntable cases, it is not enough for the complaint to show that the premises were attractive to children or that children generally were attracted thereto, but it must show that the attraction lured the injured child there with the result complained of, the facts pleaded disclosing the causal connection between the negligent act and the injury.—Fusselman v. Yellowstone V. L. & I. Co., 254.

Same—Evidence—Insufficiency.

8. Evidence in an action for the drowning of a child in the canal of an irrigation company, *held* insufficient to support a verdict on the theory that it fell in where the canal crossed a street, which should have been, but was not, covered, as required by a city ordinance.—Fusselman v. Yellowstone V. L. & I. Co., 254.

Same—Circumstantial Evidence—When Sufficient.

9. Where circumstantial evidence is relied on to establish actionable negligence, the circumstances must tend directly to establish the cause of action; where they have an equal or stronger tendency to support some other theory inconsistent with the one upon which plaintiff relies, the burden resting upon him is not satisfied.—Fusselman v. Yellowstone V. L. & I. Co., 254.

Railroads—Federal Liability Act—Assumption of Risk.

10. The defense of assumption of risk may be interposed as a bar in an action, brought under the Federal Employers' Liability Act, when the personal injury or death complained of has been caused by a hazard which is incident to the particular business or by a hazard which, though brought about by the failure of the employer to provide a safe place to work and safe appliances to work with, the employee knew or should have known of and appreciated.—Sorenson v. Northern Pacific Ry. Co., 268.

Same—Master and Servant—Injury Due to Insufficient Assistance.

11. The failure of an employer to provide a sufficient number of competent employees to perform the work in hand with reasonable safety to all those engaged in its accomplishment is culpable negligence.—Sorenson v. Northern Pacific Ry. Co., 268.

Same—Servant Overtaxing Strength—Liability of Master.

12. The general rule that, being the best judge of his own muscular capacity, an employee who undertakes to lift, or assist in lifting, a heavy object while acting in the line of his duty, whether under the direct supervision of his superior or not, assumes the risk of injury due to overtaxing his strength, *held* not to apply where the injured person is of immature years or inexperience in the work he was engaged in at the time.—Sorenson v. Northern Pacific Ry. Co., 268.

Same—Assumption of Risk—Exception.

13. A servant does not, as a matter of law, assume a risk if the hazard incident to his employment requires knowledge or judgment not

possessed by men of ordinary observation.—*Sorenson v. Northern Pacific Ry. Co.*, 268.

Same—Injury by Heavy Lifting—Liability of Master.

14. *Held*, under the above rules, that a section-hand, twenty-three years of age, without previous experience in lifting heavy rails, who while engaged in lifting one such rail thirty feet in length and weighing about 990 pounds, assisted by two others, a young man of nineteen and an old man of sixty-two, sustained a rupture, was not as a matter of law chargeable with assumption of risk, but that the question was properly submitted to the jury.—*Sorenson v. Northern Pacific Ry. Co.*, 268.

Same—Appreciation of Risk—Presumptions.

15. From the fact that plaintiff had, a short time before he was injured, seen four men lift another rail of the same size and weight, but under different conditions, he could not be presumed, as a matter of law, to have gained appreciative knowledge that the weight of the rail in the lifting of which he was ruptured was beyond the capacity of three men.—*Sorenson v. Northern Pacific Ry. Co.*, 268.

Same—Verdict Against Law—When not.

16. Since, under the evidence, the jury could properly have found either for or against the contention of appellant that plaintiff assumed the risk, their finding against it was not contrary to the law as declared in the instructions.—*Sorenson v. Northern Pacific Ry. Co.*, 268.

Same—Sufficient Assistance—Duty of Master.

17. The duty of the employer to provide, among other things, a sufficient number of men to perform the work in hand with reasonable safety to all those engaged in its accomplishment, is not discharged by providing such number in the first place, but requires that it be maintained during the progress of the work and each particular part of it.—*Sorenson v. Northern Pacific Ry. Co.*, 268.

Master and Servant—Assumption of Risk—Burden of Proof.

18. Where plaintiff's own evidence in a personal injury action furnishes the basis for no other inference than that he assumed the risk, he cannot recover unless he exculpates himself, and this whether the defense is pleaded or not.—*Stevens v. Henningsen Produce Co.*, 306.

Same—Assumption of Risk—Case at Bar.

19. Plaintiff was ordered by his employer into the basement of defendant's warehouse to remove a piece of timber which prevented a freight elevator from running at a time when a fire was discovered in the building. When the order was made, neither plaintiff nor defendant knew the nature of the obstruction, and plaintiff, being thoroughly familiar with the mechanism of the elevator, was left the exclusive judge of the course he should pursue. He placed his foot in a position in which he knew it might be, as it subsequently was, injured by the descending counterweights. *Held*, that he assumed the risk.—*Stevens v. Henningsen Produce Co.*, 306.

Same—Emergency Rule—Inapplicability.

20. Plaintiff, who acted deliberately and without the impulse of momentary excitement when he was injured (see paragraph 19, *supra*), was not excusable under the rule that where an employee receives injury while rescuing his employer's property, he will not be held guilty of contributory negligence.—*Stevens v. Henningsen Produce Co.*, 306.

Highways—Law of the Road—Automobile Accident—Negligence.

21. Evidence *held* sufficient to show that defendant, in an action to recover for personal injuries suffered by plaintiffs in colliding with the former's automobile, was at fault in failing to turn to the right of the center of the highway in time, and in omitting to exercise pre-

caution to avoid frightening the animal plaintiff was driving, as provided by sections 1 and 3 of Chapter 72, Laws of 1913, pages 158, 159.—*Savage v. Boyce*, 470.

Same—Appeal and Error—When Verdict Conclusive.

22. The evidence being in conflict as to whether plaintiff was asleep when the collision occurred, it was a question for the jury's determination; the conclusion thus reached, and approved by the trial court when it refused to grant a new trial, is conclusive on appeal.—*Savage v. Boyce*, 470.

PLEADING AND PRACTICE.

Trespass—Implied Admission in Pleading—Effect.

1. The apparently implied admission in plaintiff company's complaint seeking condemnation of a right of way of the ground covering which it had been in actual occupancy for about twelve years before, that it was a trespasser, *held* not to have been sufficient reason for refusal of a temporary injunction where there was some evidence that its original entry was made under some color or claim of right.—*Postal Telegraph-Cable Co. v. Nolan*, 129.

Mandamus—Demurrer—Admissions.

2. The allegations of fact in an affidavit for a writ of mandate will, as against a general demurrer and motion to quash, be taken as true on appeal.—*State ex rel. Fadness v. Eie*, 138.

Principal and Surety—Official Bonds—Complaint.

3. The complaint against a surety company to recover on the official bond of a constable, in failing to state that the relationship of principal and surety existed between him and the company at the time of his alleged wrongful seizure and detention of plaintiff's chattels, did not state a cause of action, the allegation that such relationship existed at the time of filing the complaint being insufficient.—*Ferrat v. Adamson*, 172.

Trial—Evidence—Exceptions—Scope.

4. Where an exception to the introduction of evidence has once been saved, it is saved for all purposes unless thereafter waived.—*Ferrat v. Adamson*, 172.

Actionable Negligence—Complaint—Contents.

5. Actionable negligence arises only from a breach of legal duty; and to state a cause of action for damages resulting from negligence, the complaint must disclose, by a statement of facts—not legal conclusions—the duty, a breach and resulting damages.—*Fusselman v. Yellowstone V. L. & I. Co.*, 254.

Turntable Doctrine—What Complaint must Contain.

6. To state a cause of action under the doctrine of the turntable cases, it is not enough for the complaint to show the premises were attractive to children or that children generally were attracted thereto, but it must show that the attraction lured the injured child there with the result complained of, the facts pleaded disclosing the causal connection between the negligent act and the injury.—*Fusselman v. Yellowstone V. L. & I. Co.*, 254.

Railroads—Killing Livestock—Complaint.

7. In an action against a railroad company for damages sustained by plaintiff in killed and injured cattle because of the company's negligence in failing to keep a gate in its right of way fence closed, plaintiff need not allege or prove that defendant knew or should have known that the gate had been left open.—*Scheffer v. Chicago, M. & P. S. Ry. Co.*, 302.

General Denial—Evidence—Admissibility.

8. Evidence of any fact which is inconsistent with, and thus negatives, plaintiff's cause of action, is admissible under a general denial.—*Hanson Sheep Co. v. Farmers and Traders' State Bank*, 324.

Same.

9. Defendant bank was, under its general denial, properly permitted to show that a balance appearing on plaintiff's pass-book had been exhausted by an appropriation made of it by plaintiff through the means of checks which had been paid by his direction.—*Hanson Sheep Co. v. Farmers and Traders' State Bank*, 324.

Removal of Officers—Accusation—Contents.

10. To constitute the offense of collecting illegal fees, the charge must state that the accused is the incumbent of a public office, that, acting by virtue of his office, he collected certain fees, and that the fees collected were illegal, *i. e.*, not authorized by law.—*State ex rel. Payne v. District Court*, 350.

Same—Accusation—Sufficiency.

11. An accusation charging an officer with collecting illegal fees may be prepared by a layman, and will be held sufficient if it clearly and distinctly sets forth the facts constituting the offense in ordinary and concise language that a person of common understanding may know what is intended.—*State ex rel. Payne v. District Court*, 350.

Same.

12. An accusation of the character above mentioned is sufficient if it shows upon its face that the fees collected were illegal; a statement that they were illegal, or wherein they were illegal, not being required. *State ex rel. Payne v. District Court*, 350.

Criminal Law—Information—Degrees of Crime.

13. Where a specific crime is divided into degrees, it is, generally speaking, sufficient to charge the commission of the substantive offense, leaving it to the jury to determine from the evidence the particular degree of which the accused is guilty.—*State v. Wiley*, 383.

Receivers—Appointment—Complaint—Insufficiency.

14. An allegation expressive of fear that crops sought to be placed in charge of a receiver might be removed and sold to innocent purchasers, was not a statement of fact justifying the district court to grant the relief asked for.—*Montana Ranches Co. v. Dolan*, 397.

Cancellation of Instruments—Fraud—Complaint.

15. In order to make out a case of fraud, the complaint must allege that the defendant made a representation intending that the plaintiff should act upon it; that the representation was false; that plaintiff believed it, and that he acted upon it to his damage.—*Buhler v. Loftus*, 546.

Same—Expression of Opinion—Future Events—Complaint.

16. Generally, a mere expression of opinion, however erroneous, a misrepresentation as to what will be done in the future, or a statement of intention, will not warrant cancellation of a contract for fraud.—*Buhler v. Loftus*, 546.

Same—Fraud.

17. A misrepresentation with reference to the future, but so related to present conditions that its affirmation will constitute fraud, is sufficient cause for cancellation of the resultant contract.—*Buhler v. Loftus*, 546.

Same—Complaint—Inferences—Sufficiency.

18. Whatever is necessarily implied in or is reasonably to be inferred from an allegation is to be taken as directly averred.—Buhler v. Loftus, 546.

Same—Fraud—Complaint.

19. False representation that an investment company would be ready for business within two months, made to induce the sale of stock was a fraud, within the meaning of section 4978, Revised Codes.—Buhler v. Loftus, 546.

Same—Complaint—Remedy at Law.

20. An allegation in plaintiff's complaint specifically stating that he had no adequate remedy at law, *held* unnecessary; the question whether the case presented was one of equitable cognizance depending upon the averments upon which demand for relief was predicated, not upon the conclusion of law drawn from them by the pleader.—Buhler v. Loftus, 546.

Same—Offer to Return Consideration—Complaint.

21. Where the complaint seeking cancellation of a mortgage and notes offered to return the stock in purchase of which they were given, it was a sufficient allegation of an offer to restore the consideration.—Buhler v. Loftus, 546.

Same—Complaint—Amendment During Trial—Discretion.

22. Where defendants made no showing that they were surprised by an amendment of the complaint made during the course of trial, or were not ready or able to produce all the evidence they desired, they were not in position to allege abuse of discretion on the part of the trial court in permitting the amendment to be made.—Buhler v. Loftus, 546.

Same—Pleading and Practice—Reply.

23. The office of a reply is to join issue on or avoid new matter alleged in answer; it cannot aid the complaint by supplying an omission broadening its scope or adding a new ground of relief; hence the admission of evidence in support of such objectionable averments was error.—Buhler v. Loftus, 546.

POLICY OF LAW.

See Executors and Administrators, 1, 8.

POWERS.

Implied,—see Farm Loans, 5.

PRESUMPTIONS.**Electors—Lack of Qualifications.**

1. Slight proof of the lack of any necessary qualification to vote is sufficient to overcome the presumption arising from registration or previous voting, and calls for evidence in affirmation of the voter's qualifications, from the party who would benefit from the vote.—Sommers v. Gould, 538.

Findings—Incompetent Evidence.

2. The presumption obtains that the trial court in making its findings in an equity case, after argument by counsel, considered only so much of the evidence as was competent and substantially material, rejecting such as ought to have been rejected.—Buhler v. Loftus, 546.

Quartz Lode Veins.

3. In the absence of a contrary showing, the presumption obtains that a vein found beneath the surface of one's quartz lode claim will con-

tinue to extend upward at the same angle as exhibited below.—*Barker v. Condon*, 585.

PRINCIPAL AND SURETY.

Official bonds—Complaint,—see Pleading and Practice, 3.

PROHIBITION.

Scope of Writ.

1. When the writ of prohibition issues out of the supreme court, it arrests proceedings of a judicial character only; hence it does not lie as against a sheriff, he being a ministerial officer.—*State ex rel. Myersick v. District Court*, 450.

Writ Issues, When.

2. The writ of prohibition issues only in the sound legal discretion of the court—not as a matter of right—and when a plain, speedy and adequate remedy in the ordinary course of law does not exist; it is to be used sparingly in furtherance of justice and to secure order and regularity in inferior tribunals.—*State ex rel. Myersick v. District Court*, 450.

Burden of Proof.

3. The applicant for a writ of prohibition assumes the burden of showing that the lower court is acting without or in excess of jurisdiction, and that no plain, speedy and adequate remedy in the ordinary course of law exists.—*State ex rel. Myersick v. District Court*, 450.

Improper Issuance—Case at Bar.

4. Where the district court ordered an attached stock of liquors, cigars, etc., before judgment in the interest of the parties as provided by Revised Codes, section 6671, the application alleging that the goods were depreciating in quality and value, that the liquor licenses were expiring unused, and that the expense of keeping the property was continuing, an abuse of discretion warranting issuance of the writ of prohibition held not apparent.—*State ex rel. Myersick v. District Court*, 450.

Remedy at Law.

5. Where a third party claiming attached property sold before judgment had a remedy by action in claim and delivery, or in conversion or by intervention in the original action, prohibition will not lie.—*State ex rel. Myersick v. District Court*, 450.

PROMISSORY NOTES.

See Negotiable Instruments.

PUBLIC LANDS.

See, also, Criminal Law, 7, 8.

Public Use—Policy of Federal Government.

1. It is the policy of the federal government that the open, unoccupied public lands shall be free to all persons who desire to use them for grazing purposes; hence no one can lawfully exercise exclusive control over, and thus monopolize the use of, them.—*State v. Bradshaw*, 96.

PUBLIC OFFICERS.

Removal, for receiving illegal fees,—see Office and Officers, 6–13.

Who is a public officer,—see Quo Warranto, 3–5.

PUBLIC POLICY.

Contract to procure testimony,—see Contracts, 13.

Creation of new counties,—see Counties, 12.

QUO WARRANTO.

See, also, Office and Officers, 3.

Legislature—Right to Seat—Supreme Court—Jurisdiction.

1. Since each house of the legislative assembly is, under section 9, Article V, of the state Constitution, the judge of the ultimate right of persons to seats as members thereof, the supreme court is without jurisdiction to entertain a proceeding in *quo warranto* to determine such right.—State ex rel. Ford v. Cutts, 300.

Scope of Writ.

2. A private individual is limited in his right to the remedy by *quo warranto*, to a case in which he claims to be entitled to a public office unlawfully held and exercised by another.—State ex rel. Boyle v. Hall, 595.

“Public Office”—Definition.

3. To constitute an office a public one, the duties pertaining to it must concern the public and be imposed by public authority; they must imply personal responsibility as distinguished from the merely clerical acts of an agent or servant; and while the elements of fixed service and compensation are not indispensable, their absence indicates to some extent that the office is not a public one.—State ex rel. Boyle v. Hall, 595.

Same—Definition.

4. A public officer is a part of the personal force by which the state thinks, acts, determines and administers to the end that its Constitution may be effective and its laws operative.—State ex rel. Boyle v. Hall, 595.

State Board of Railroad Commissioners—Chairmanship—Not Public Office.

5. *Held*, that the chairmanship of the board of state railroad commissioners is not a public office, and that therefore the writ of *quo warranto* does not lie to determine the right of one of its members to act as chairman.—State ex rel. Boyle v. Hall, 595.

RACING.

See Horse-racing.

RAILROAD COMMISSIONERS.

See State Board of Railroad Commissioners.

RAILROADS.

Logging railroad,—see Personal Injuries, 1, 2.

Power of board of railroad commissioners,—see Injunction, 10.

Servant injured by heavy lifting,—see Personal Injuries, 10–17.

Interstate Commerce—Bills of Lading—Waiver.

1. A carrier engaged in interstate commerce cannot, under the Interstate Commerce Act, waive compliance with the requirement in a bill of lading making it incumbent on the shipper of cattle, as a condition precedent to his right to recover damages for injury to them while in transit, to give notice in writing of his claim before they are removed from the place of destination or mingled with other stock.—Wall v. Northern Pacific Ry. Co., 81.

Livestock—Fences—Gates—Duty to Keep Closed.

2. Where for the convenience of a ranch owner a railroad company constructed a private crossing and a gate in its right of way fence, the company was, under section 4308, Revised Codes, in duty bound to see that it was not left open by persons passing through it; failure in this respect constituting negligence *per se*.—*Scheffer v. Chicago, M. & P. S. Ry. Co.*, 302.

Killing Livestock—Complaint.

3. In an action against a railroad company for damages sustained by plaintiff in killed and injured cattle because of the company's negligence in failing in its duty above adverted to, plaintiff need not allege or prove that defendant knew or should have known that the gate had been left open.—*Scheffer v. Chicago, M. & P. S. Ry. Co.*, 302.

REAL PROPERTY.

See Contracts; Deeds; Executors and Administrators, 1-9; Tax Deeds; Trespass; Trusts.

RECEIVERS.

Appointment—Exercise of Power.

1. Under section 6698, Revised Codes, the power to appoint a receiver is to be exercised sparingly and with unusual caution, and only to prevent manifest wrong imminently impending, or where there is no other plain, speedy or adequate remedy.—*Montana Ranches Co. v. Dolan*, 397.

Same—Discretion—Burden of Proof.

2. An application for the appointment of a receiver is addressed to the sound legal discretion of the trial court; the burden of showing abuse of such discretion being upon appellant.—*Montana Ranches Co. v. Dolan*, 397.

Same—Necessity of Appointment.

3. Since the remedy by receivership is one never to be allowed except upon a showing of necessity therefor, appellant had the burden of showing such necessity.—*Montana Ranches Co. v. Dolan*, 397.

Same—Complaint—Insufficiency.

4. An allegation expressive of fear that crops sought to be placed in charge of a receiver might be removed and sold to innocent purchasers, was not a statement of fact justifying the district court to grant the relief asked for.—*Montana Ranches Co. v. Dolan*, 397.

Same—Other Remedies Available.

5. Where injunction would have prevented the threatened sale of crops before severance from the soil, and claim and delivery would have defeated the same purpose after severance, receivership was properly denied.—*Montana Ranches Co. v. Dolan*, 397.

RECORD ON APPEAL.

Dismissal of appeal, for failure to file,—see Appeal and Error, 25.

Service of, on attorney general—Technical violation of rule,—see Appeal and Error, 9.

Use of bill of exceptions,—see Appeal and Error, 10.

REFORMATION OF INSTRUMENTS.

Evidence—Quantum of Proof.

1. The rule that to warrant reformation of an instrument for mistake, the evidence must be clear, convincing and satisfactory, refers to the quality, rather than the quantity, of proof.—*Parchen v. Chessman*, 430.

Same.

1. To warrant reformation of an instrument for mistake, it is not necessary that the mistake be made in respect beyond a reasonable doubt, it is only question of proof beyond a bare preponderance. Rev. Code, sec. 430, which preponderance may be established by the testimony of a single witness as against a greater number of witnesses who testify to the contrary. See 751. —*Parthen v. Chessman*, 431.

Case of Scrivener—Exoner—Sufficiency.

2. Exoner held sufficient to warrant a finding that a mistake had been made twenty-one years before date of trial, by a scrivener in drafting a renewal note so as to insert a clause waiving the benefit of the statute of limitations not a part of the original note.—*Parthen v. Chessman*, 431.

"Mutual" Mistake—Evidence.

3. To warrant the reformation of an instrument because of mistake in drafting it, it is not necessary that both parties go upon the witness-stand and admit that the mistake was mutual; where plaintiff admits that no mistake was made, and defendant deposes to the contrary, the question is one of credibility and weight to be given to their testimony.—*Parthen v. Chessman*, 432.

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4. Though, in a given case, a technical "mutual" mistake may not be presented to a court of equity, the mistake having been that of a scrivener in formulating the note sought to be reformed, it will nevertheless correct the writing so as to make it express the real agreement of the parties.—*Parthen v. Chessman*, 430.

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Section 3896 58

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Mistake of Scrivener—Evidence—Sufficiency.

3. Evidence *held* sufficient to warrant a finding that a mistake had been made, twenty-one years before date of trial, by a scrivener in drafting a renewal note so as to insert a clause waiving the benefits of the statute of limitations not a part of the original note.—Parchen v. Chessman, 430.

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STATUTES AND STATUTORY CONSTRUCTION.

Initiative—Status of Enactment—Constitution.

1. Statutes enacted by the people directly under the initiative are of equal dignity with those passed by the legislative assembly and approved by the governor; in the enactment of the former the provisions of the state Constitution can no more be transgressed than in that of the latter. *State ex rel. Evans v. Stewart, 18.*

Legislative Power—Constitution.

2. The state legislature possesses plenary legislative power, except as limited by the Constitution of the United States, the treaties made and statutes enacted pursuant thereof, and by the Constitution of the state. *State ex rel. Evans v. Stewart, 18.*

Validity of Statutes—How Determined.

3. The validity of an Act called in question is to be determined, not only by what is certain to be done, but by what may be done, under it. *State ex rel. Evans v. Stewart, 18.*

Statutory Construction—Rule.

4. In construing a statute, the court must, if possible, ascertain and carry into effect the intention of the legislature, which must be gathered from the terms of the statute when considered in the light of surrounding circumstances.—*State ex rel. Evans v. Stewart, 18.*

Power of Legislature—Constitutional Limitations.

5. The authority of the legislature, otherwise plenary, will not be held circumscribed by implication; but one who seeks to limit it must be able to point out the particular provision of the Constitution which contains the limitation in clear terms.—*State ex rel. Evans v. Stewart, 18.*

Livestock—Driving from Range—Statutes.

6. *Held*, that section 8858, Revised Codes, and not section 8860—both of which make unlawful the driving of livestock from their accustomed range—declares the law upon the subject.—*State v. Bradshaw, 96.*

Remedial Legislation—Construction.

7. Remedial legislation should not be limited by a narrow construction. *Regan v. Montana Logging Co., 153.*

Construction—Intention of Legislature.

8. In the construction of a statute the primary duty of the court is to give effect to the intention of the legislature in enacting it, which

intention must be sought in the language employed and the apparent purpose to be subserved.—*State ex rel. Carter v. Kall*, 162.

Landlord and Tenant—Failure to Repair—Liability of Landlord.

9. Sections 5226 and 5227, Revised Codes, providing that a lessor of a building intended for human occupation must put it in condition therefor, and repair subsequent dilapidations, and if, after reasonable notice, he neglects to do so, the lessee may repair and deduct the expenses from rent, or vacate without liability for rent, gives no right of action for personal injuries to a tenant caused by failure to repair.—*Dier v. Mueller*, 288.

Statutory Construction—Rule.

10. In construing a statute, the words employed must be given their ordinary meaning, unless it is made apparent from their character, or the context or subject, that a different one was intended.—*Scheffer v. Chicago, M. & P. S. Ry. Co.*, 302.

Same.

11. Where the language of a statute is plain, simple, direct and unambiguous, construction by the courts is not called for—it construes itself.—*Scheffer v. Chicago, M. & P. S. Ry. Co.*, 302.

Statutes—Constitutional Construction—Rule.

12. Where a statute is assailed as unconstitutional, the question is not whether it is possible to condemn, but whether it is possible to uphold, and it will not be declared unconstitutional unless its nullity is placed, in the court's judgment, beyond reasonable doubt.—*State ex rel. Fenner v. Keating*, 371.

New Counties—Local and Special Laws—Implied Repeal.

13. *Held*, that Chapter 56, Laws of 1917, creating Carter county, is not invalid as violative of section 26, Article V, of the Constitution, forbidding special legislation where a general law can be made applicable; the Act creating the county being an implied legislative determination that the general law providing for the creation of new counties (Chap. 112, Laws of 1911 and amendments) is no longer applicable under present conditions.—*State ex rel. Ford v. Schofield*, 502.

STOCK AND STOCKHOLDERS.

See Corporations.

SUPREME COURT.

See, also, Appeal and Error; Findings; Quo Warranto.

Cannot, on appeal, direct judgment—When,—see Appeal and Error, 5.

TAX DEEDS.

Preliminary Notice—Evidence.

1. The reception of tax deeds in evidence without proof of the fact that the holder of the certificates of purchase gave the thirty-day notice of his intention to apply for the deeds, as required by sections 3895 and 3896, Political Code of 1895 (Rev. Codes, secs. 2651, 2652), was error.—*Horsky v. McKennan*, 50.

Same—Evidence.

2. A tax deed is not even *prima facie* evidence that the holder of the certificate, before applying for the deed, gave the thirty-day notice of intention to apply therefor required by law to be given before the deed could issue.—*Horsky v. McKennan*, 50.

Indefinite Description of Land—Effect.

3. A description of land in a tax deed so indefinite that the property (city lots) intended to be conveyed could not be identified except by inference, was ineffective.—*Horsky v. McKennan*, 50.

Sale *en Masse* Void.

4. A tax deed, showing on its face that it was based on a sale *en masse* of several noncontiguous parcels, was void.—Horsky v. McKennan, 50.

Estoppel.

5. Tax deeds are antagonistic to the fee; there is no privity between the holder of the one and the holder of the other, and neither owes any duty to, nor is estopped from making any claim against, the other.—Horsky v. McKennan, 50.

Same—Case at Bar.

6. That the holder of the fee signed assessment lists containing faulty descriptions of the property later sold for unpaid taxes; that, though present at the sale, he did not object to the method adopted; and that it was at his instance that the purchaser at the sale appeared, did not estop him to contest the validity of the deeds on the grounds mentioned in paragraphs 3 and 4, *supra*.—Horsky v. McKennan, 50.

Void Tax Deeds—Adverse Possession.

7. While tax deeds, void on their face, were ineffectual to constitute title, they were evidence of a claim of title ample to sustain a *possessio pedis*, sufficient, under general statutes of limitation, to support adverse possession of the lands adequately described.—Horsky v. McKennan, 50.

Ejectment—Adverse Possession—Trusts—Evidence.

8. Where defendants in ejectment relied on adverse possession under tax deeds for more than the statutory period, as well as on estoppel, refusal of an offer of proof that they went into possession under a trust agreement under which they were to hold the property until from the rents and profits thereof they had reimbursed themselves for moneys owing to and for outlays made by them in caring for it, whereupon reconveyance should be made to plaintiff, was error.—Horsky v. McKennan, 50.

Same—Tax Deeds—Action to Set Aside—Statute of Limitations.

9. Chapter 50, Laws of 1909, providing that a right of action to annul a tax deed shall be barred unless instituted within two years after its issuance, presupposes a valid instrument; hence one which is void on its face, and is therefore not a deed but a nullity, does not come within the purview of such provision.—Horsky v. McKennan, 50.

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See, also, Tax Deeds, 8.

Real Property—Wrongful Transfer by Trustee—Burden of Proof.

1. The burden of proving that a conveyance of real property made by a trustee in contravention of an express trust is void, rests upon him who asserts the invalidity of the instrument.—Horsky v. McKennan, 50.

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In Lump Sum—Conclusiveness.

1. Where an action against a railroad for injury to cattle while in transit was based on three different items of damage, and it is impossible to determine from the record what particular items were considered by the jury in returning a verdict in a lump sum, the supreme court cannot direct judgment awarding damages for any one of the items, and thus substitute its findings for those of the jury.—Wall v. Northern Pac. Ry. Co., 81.

When not Against Law.

2. Since, under the evidence, the jury could properly have found either for or against the contention of appellant that plaintiff assumed the risk of the injury he received, their finding against it was not contrary to the law as declared in the instructions.—Sorenson v. Northern Pac. Ry. Co., 268.

Criminal Law—Conclusiveness of Verdict.

3. Where the evidence upon an issue in a criminal case is in conflict, the finding of the jury thereon, approved by the district court in denying a new trial, is conclusive, and the claim that the verdict is contrary to the evidence has no merit.—State v. Brodock, 463.

VOTING MACHINES.

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2. As against collateral heirs, an adopted child, in the absence of a will, succeeds to all the estate of the person adopting.—In re Pepin's Estate, 240.

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